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No. _____

In The

Supreme Court of the United States

October Term, 1996

PAULINE BRINE, ELIZABETH PELTON
AND NANCY THOMPSON,

Petitioners,

vs.

THE IOWA BOARD OF REGENTS
AND THE UNIVERSITY OF IOWA,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

What is the proper standard for a prima facie case of retaliation in violation of Title VII in light of this Court's *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), decision?

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OPINIONS BELOW

The Petitioners, Pauline Brine, Elizabeth Pelton, and Nancy Thompson, respectfully pray that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Eighth Circuit, which was entered in the above-entitled proceeding on July 19, 1996.

The latest opinion of the United States Court of Appeals for the Eighth Circuit in this case was an unreported decision to deny a Petition for Rehearing and Suggestions for Rehearing En Banc. That opinion was issued on September 20, 1996, in *Pauline Brine, et al., v. University of Iowa and Iowa State Board of Regents* and is reproduced in the Appendices to this Petition at App. 27.

The decision of the Eighth Circuit in this case was entered on July 19, 1996, and is reported as *Brine v. University of Iowa, et al.*, 90 F.3d 271 (8th Cir. 1996). This decision is reproduced in the Appendices to this Petition beginning at App. 1.

The unreported Opinion and Judgment of the United States District Court of the Southern District of Iowa Central Division was entered on May 5, 1995, and is reproduced in the Appendices to this Petition beginning at App. 12.

BASIS FOR JURISDICTION

Respondents, The University of Iowa and The Iowa State Board of Regents, sought review of the opinion and judgment entered by the trial court which upheld the jury verdict on the Petitioners' Title VII retaliation claim. The

Eighth Circuit reversed and dismissed on July 19, 1996 the opinion and judgment entered by the Trial Court on Petitioners' Title VII retaliation claim and later denied the Petitioners' Petition for Rehearing and Suggestions for Rehearing En Banc on September 20, 1996.

The statutory provision conferring jurisdiction on this Court to review the judgment by Writ of Certiorari is 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Statute involved is 42 U.S.C. 2000e-3(a) of the Civil Rights Act of 1964, as amended, which states:

Title 42, Section 2000e-3(a):

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Petitioners were employed by The University of Iowa ("University") as tenured associate professors in the Department of Dental Hygiene ("DDH"); a department that consisted of an all female faculty and student body. Upon learning that the DDH would be closed by the University for what the Petitioners contend was no legitimate reason, the Petitioners objected that the actions of the University were discriminatory on the basis of their gender. Immediately thereafter, the University took what the Petitioners contend were retaliatory adverse actions against them by, *inter alia*, 1) giving them lower than average salary increases, 2) excluding the Petitioners from review committees, 3) demoting Petitioner Brine from Chair of the DDH to program coordinator, 4) withdrawing resources necessary for the performance of the Petitioners' assigned duties, 5) planning to prematurely close the DDH before the last students had graduated contrary to the University's prior precedent for closing departments, 6) interfering with the Petitioners access to the Dean's report on the Ad Hoc Committee, and 7) failing to assist the transfer of Petitioners to another mutually agreeable department as the University had done for other similarly situated faculty in the past.

After exhausting their administrative remedies, the Petitioners filed this case in 1993 in the United States District Court for the Southern District of Iowa Central Division ("trial court"). Petitioners' complaint alleged that their employer, the University, violated their constitutional rights, under the United States and Iowa Constitutions, to due process, equal protection and freedom of speech and discriminated against them on the basis of

their gender in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), Title IX of the Education Amendments of 1972 ("Title IX"), and the Iowa Civil Rights Code ("ICRC"). Additionally, Petitioners' complaint alleged that they had been retaliated against in violation of Title VII, Title IX and the ICRC for their objections to the University's discriminatory actions.

A twelve day mixed bench/jury trial was held in Des Moines, Iowa, April 10-25, 1995. After consideration, the jury returned a verdict for the Petitioners on their claim of unlawful retaliation in violation of Title VII and awarded compensatory damages in the amount of $195,000 to the Petitioners. The jury also found for the Petitioners on the claim that their First Amendment rights had been violated. However, the trial court subsequently granted judgment as a matter of law for the University on the jury's First Amendment verdict. The trial court found for the University on the Petitioners' other claims and denied Petitioners' and Respondents' Motions for New Trial on June 15, 1995.

The University appealed the opinion and judgment of the trial court on Petitioners' retaliation claim to the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"). The Eighth Circuit reversed the trial court's judgment for the Petitioners on their retaliation claims and ordered the trial court to enter judgment for the University. (App. at 3-4).

The Petitioners filed a Petition for Rehearing and Suggestions for Rehearing En Banc which was denied by the Eighth Circuit on September 20, 1996. (App. at 27).

The jurisdiction of the trial court was invoked under 28 U.S.C. §§ 1331, 1343(a), and 1367. The jurisdiction of the Eighth Circuit was invoked under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

I. INTRODUCTION

A Writ of Certiorari should issue in this case to allow for the resolution of the conflict between the Courts of Appeal concerning the prima facie case necessary to avoid dismissal as a matter of law for Title VII retaliation ("retaliation") claims. While the Supreme Court addressed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) the prima facie case necessary to avoid dismissal in Title VII discrimination cases, this Court has yet to squarely address the prima facie case necessary to avoid dismissal in retaliation cases. The lack of guidance by this Court has resulted in the circuits applying distinctly different tests that a plaintiff must meet to establish a prima facie case of retaliation that directly conflict with each other and, in some circuits, directly conflict with this Court's precedent.

Nevertheless, this Court recently acknowledged that retaliation in violation of Title VII is a conflicting area of the law that requires its guidance when it agreed to determine this term whether former employees fall under Title VII's anti-retaliation parameters. *Robinson v. Shell Oil Co., 69 FEP Cases 522 (4th Cir 1995), petition for cert. granted.* As this Court's intervention was needed in the *Robinson* case, it is even more so needed in the present

case to guide the circuits (particularly the Eighth Circuit) regarding the prima facie case necessary for a plaintiff to avoid dismissal of a retaliation claim as a matter of law. Without this Court's guidance, the circuits will continue to render decisions that conflict with each other, thus allowing plaintiffs in some circuits to be dismissed as a matter of law while allowing other plaintiffs to prevail on nearly identical fact patterns. Certainly, this is contrary to Congress' intent that Title VII be applied evenly and consistently throughout the circuits to help eliminate from employment the pernicious effects of discrimination and retaliation.

II. THERE IS A DIRECT CONFLICT BETWEEN THE COURTS OF APPEAL CONCERNING THE PRIMA FACIE CASE NECESSARY FOR A TITLE VII RETALIATION CLAIM.

While the circuits conflict with one another concerning the prima facie case necessary for a retaliation claim, they have generally agreed that the general burden of proof framework for a retaliation claim should be based on the burden of proof formulated in this Court's *McDonnell Douglas* decision. Generally, to successfully prevail on a retaliation claim, the circuits require that the plaintiff first prove a prima facie case. Once the prima facie case is proven, the burden of production then shifts to the defendant to present a legitimate nondiscriminatory reason for its actions. If the defendant presents such a reason, the plaintiff may then counter by showing that the proffered

nondiscriminatory reason is pretextual. *Petitti v. New England Tel. & Tel. Co.*, 909 F.2d 28, 33 (1st Cir. 1990).[1]

Nevertheless, even though the circuits seemingly agree on the stages of the burden of proof necessary to establish Title VII retaliation, they directly conflict with one another regarding the first and most important step of the burden of proof for purposes of avoiding premature dismissal, the plaintiff's prima facie case. Because *McDonnell Douglas* did not set forth the prima facie case necessary for Title VII retaliation, the circuits began "adjusting" this decision to create the elements of a prima facie case of retaliation. *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985). This has resulted in the circuits formulating a framework for a prima facie retaliation case that generally requires the plaintiff to show 1) the employee's engagement in a statutorily protected activity, 2) the employee suffered an adverse action, and 3) a causal connection existed between the two. *See Mitchell*, 759 F.2d at 86.[2]

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[1] *See also, Tomka v. The Seiler Corp.*, 66 F.3d 1295, 1308 (2d Cir. 1995); *Delli Santi v. CNA Insurance Cos.*, 88 F.3d 192, 198-199 (3d Cir. 1996); *Egbuna v. Time-Life Libraries, Inc.*, 95 F.3d 353, 355-356 (4th Cir. 1996); *Long v. Eastfield College*, 71 FEP Cases 750, 752 (5th Cir. 1996); *Johnson v. HHS*, 30 F.3d 45, 47 (6th Cir. 1994); *McKenzie v. Ill. Dept. of Transportation*, 92 F.3d 473, 483 (7th Cir. 1996); *Jackson v. Delta Special School District*, 86 F.3d 1489, 1494 (8th Cir. 1996); *Ortez v. Washington County*, 88 F.3d 804, 809 (9th Cir. 1996); *Chavez v. City of Arvada*, 88 F.3d 861, 865 (10th Cir. 1996); *Coutu v. Marin County Board*, 47 F.3d 1068, 1074 (11th Cir. 1995); *Mitchell v. Baldridge*, 759 F.2d 80, 86 (D.C. Cir. 1985).

[2] *See also, Petitti*, 909 F.2d at 33; *Tomka*, 66 F.3d at 1308; *Delli Santi*, 88 F.3d at 198-199; *Egbuna*, 95 F.3d at 355; *Long*, 71 FEP Cases at 752; *Johnson*, 30 F.3d at 47; *McKenzie*, 92 F.3d at 483;

However, the similarity in the framework utilized by the circuits for a prima facie retaliation case shrouds the true conflict between the circuits regarding the second "adverse action" and third "causal connection" prongs. This conflict is most evident from the Third and Eighth Circuits use of a "totality of the circumstances" test to establish the causal connection prong that directly conflicts with the First, Second, Ninth, Tenth, Eleventh, and District of Columbia Circuits' "timing" test and the Fifth and Seventh Circuits' "but-for" test. Moreover, with regard to the adverse action prong, the Seventh, Eighth and Eleventh Circuits' utilize a "materially adverse" requirement for this prong that conflicts with other circuits, including the District of Columbia Circuit's use of a lesser "adverse impact" requirement. It is the implementation of these differing tests by the circuits that has resulted in the rendering of conflicting decisions for which a Writ of Certiorari must issue to allow for uniformity in application of Title VII's anti-retaliation provision.

A. THE EIGHTH CIRCUIT'S PRESENT DECISION THAT EVIDENCE OF TIMING WAS INSUFFICIENT TO ESTABLISH CAUSAL CONNECTION CONFLICTS WITH DECISIONS RENDERED BY THE MAJORITY OF CIRCUITS

As stated previously, the Eighth Circuit has rendered decisions regarding the prima facie case necessary for

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Jackson, 86 F.3d at 1494; *Ortez*, 88 F.3d at 809; *Chavez*, 88 F.3d at 865; *Coutu*, 47 F.3d at 1074.

retaliation that directly conflict with the First, Second, Ninth, Tenth, Eleventh, and District of Columbia Circuits. This direct conflict was demonstrated explicitly in the Eighth Circuit's present decision when it held that the Petitioners had not met their burden of proving a prima facie case of retaliation because "timing alone is not enough" to meet the causal connection prong. (App. at 5).[3] In so doing, the Eighth Circuit focused on whether the Petitioners had introduced evidence other than timing[4] to establish the causal connection prong. Specifically, the Eighth Circuit indicated that this "other" evidence must include evidence that the adverse actions taken against the Petitioners were "motivated by sex discrimination." (App. at 4-5). Thus, requiring evidence of discriminatory motive as well as retaliating motive to establish the causal connection prong in the Eighth Circuit. (App. at 4-5).

The test used by the Eighth Circuit in the present decision can best be summed a "totality of the circumstances" test that treats timing as only a component of the

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[3] Because the Eighth Circuit's present decision was based primarily on alleged insufficiency of evidence (other than timing), to establish the causal connection prong, the split between the circuits regarding the causal connection prong will be addressed before the split between the circuits regarding the adverse action prong.

[4] In its decision, the Eighth Circuit tacitly acknowledged that the Petitioners had presented evidence of timing that tended to establish that the alleged adverse acts were causally connected to the Petitioners' engagement in a protected activity. (App. at 4).

proof necessary to establish causal connection. The "totality of the circumstances" test traces its roots to the Third Circuit's decision in *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 501 (3d Cir. 1991). In *Quiroga*, the Third Circuit stated that while its prior decisions[5] had focused on timing as a key component of the causal connection prong, the Third Circuit "stopped short of creating an inference based upon timing alone." *Quiroga*, 934 F.2d at 501. Instead, the Third Circuit focused on other circumstances to give rise to a retaliatory inference, such as the credibility and demeanor of witnesses. *Quiroga*, 934 F.2d at 502.

The circuits that use timing alone to establish the casual connection prong trace this test to one of the first decisions to address the prima facie case necessary for Title VII retaliation, *Hochstadt v. Worcester Foundation*, 425 F.Supp. 318, 324 (D.Mass.), aff'd, 545 F.2d 222 (1st Cir. 1976). In *Hochstadt*, the First Circuit structured the prima facie case for retaliation so the causal connection prong was replaced by a prong that would allow the Court to infer retaliatory motive solely from evidence demonstrating that the adverse employment action closely followed the employee's engagement in a protected activity. *Hochstadt*, 425 F.Supp. at 324.

Since *Hochstadt* was decided over two decades ago, over one-half of the circuits have followed the First Circuit's lead and made timing itself sufficient to establish the causal connection prong. The significance of timing has even been recognized by Justice Scalia in *Mitchell*, a

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[5] *See Jalil v. Avdel Corp.*, 873 F.2d 701, 709 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 725 (1990).

decision that he participated in while a Circuit Judge for the Court of Appeals for the District of Columbia Circuit. In *Mitchell*, the District of Columbia Circuit explicitly acknowledged that timing is one of the key factors in establishing a prima facie case of retaliation by stating that:

> The causal connection component of the prima facie case may be established by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity.

Id. at 86.

Other circuits have held similarly. *See Nakai v. Wickes Lumber Co.*, 906 F. Supp. 698, 705 (D.Maine 1995) ("Evidence of proximity in time between the protected activity and the adverse employment action is among the most common forms of proof of retaliatory motive, at both the prima facie case and pretext of retaliation stages of the *McDonnell Douglas* sequence"); *Tomka*, 66 F.3d at 1308 ("timing . . . supports an inference of discrimination sufficient to establish a [retaliation] prima facie case."); *Taiwo v. Southland Corp.*, 1995 WL 608575, 4 (D.Md. 1995) ("temporal proximity may be sufficient indirect evidence of causation for purposes of plaintiff's prima facie case . . . "); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) ("Causation sufficient to establish the third element of the prima facie case may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision."); *Chavez*, 88 F.3d at 866 (inference of retaliatory motive can be drawn from timing

alone if less than three years passes between the engagement in a protected activity and the adverse employment action); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 601 (11th Cir. 1986) ("The short period of time . . . between the filing of the discrimination complaint and the plaintiff's discharge belies any assertion by the defendant that the plaintiff failed to prove causation. The plaintiff carried her initial burden.").

In addition to conflicting with circuits that focus on timing, the Third and Eighth Circuit's decisions regarding the proof necessary to establish the causal connection prong, conflict with decisions rendered by the Fifth, Sixth and Seventh Circuits regarding the same issue. In the Fifth, Sixth and Seventh Circuits to establish the causal connection prong, a plaintiff must prove that "but for" the engagement in a protected activity, the employer would not have taken the adverse employment action against the employee. *See Long*, 71 FEP Cases at 756 ("[A] plaintiff must show that the adverse employment action would not have occurred 'but for' the protected activity in order to prove unlawful retaliation."); *Canitia v. Yellow Freight System, Inc.*, 903 F.2d 1064, 1068 (6th Cir. 1990) ("A plaintiff in this type of case must establish that the decision complained about as retaliatory would not have been made 'but for' the protected status of the plaintiff."); *McKenzie*, 92 F.3d at 483 ("In order to demonstrate the 'causal link,' [the employee] must demonstrate that [the employer] would not have taken the adverse action 'but for' the protected expression.").[6]

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[6] Without stating it, the circuits that use the "but for" test appear to be stating that the employee's engagement in a

Even though circuits utilizing the "but for" test have altered the proof necessary to establish the causal connection prong, they (unlike the Third and Eighth Circuits) still rely on timing as one method of establishing a logical nexus between the protected activity and the adverse action taken against the employee. *See McKenzie*, 95 F.3d at 485 (Implying that the likelihood that "there is a causal link" is increased as the "temporal distance between [the employee's] protected expression and the adverse action" decreases.).

Nevertheless, not only has there been a deepening conflict between the circuits within the last few years regarding the necessary proof for the causal connection prong, but the "totality of the circumstances" test applied by the Third and Eighth Circuits directly conflicts with the holding of this Court's decision in *McDonnell Douglas*. In *McDonnell Douglas*, this Court set forth the burden of proof and prima facie case elements necessary for a plaintiff to successfully prevail in a Title VII discrimination case when there was no substantial direct evidence of discrimination. *See Simmons v. Camden Cty. Bd. of Ed.*, 757 F.2d 1187, 1189 (11th Cir. 1985). However, the Eighth Circuit, (as well as the Third and, in some instances, the Fifth, Sixth and Seventh Circuits) in Title VII retaliation cases, apparently now requires that the plaintiff introduce

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protected activity must be the determining factor for why the adverse action was taken against the employee. This itself conflicts with Congress' 1991 amendments to Title VII that allow for liability if it is shown that the prescribed unlawful basis under Title VII was a motivating factor in the adverse actions taken against the plaintiff.

direct evidence that the plaintiff's engagement in a protected activity resulted in the adverse employment action, contrary to this Court's decision in *McDonnell Douglas*.

This requirement of direct evidence at the prima facie stage of the burden of proof occurred in the present case when the Eighth Circuit dismissed the Petitioners' retaliation claim because they allegedly could not produce:

> evidence other than timing tending to establish that the challenged [actions] were *because* of their allegations of sex discrimination.

(App. at 5) (emphasis in original). While the Petitioners' retaliation claim was dismissed in the Eighth Circuit because they could not produce direct evidence (other than timing) to establish the causal connection prong, in at least six other circuits the Petitioners' retaliation case would have been allowed to proceed to the next stage of the burden of proof.[7] As a cursory review of the cases set forth herein indicates, this direct evidence requirement by the Eighth Circuit is a radical departure from the prima facie case format first used in *McDonnell Douglas*.

This radical departure by some circuits concerning the proof necessary at the prima facie stage of the burden of proof has not gone unnoticed by circuits, including the Eleventh Circuit, that follow this Court's *McDonnell Douglas* decision. In *Simmons*, the Eleventh Circuit utilized the three prong framework for a prima facie case of

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[7] Ultimately, the burden of proof was decided in favor of Petitioners at the trial stage as both the jury and trial court found evidence sufficient to support a verdict of Title VII retaliation had been introduced during the trial of the case.

retaliation that was set forth by the Fifth Circuit in *Whatley v. Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325, 1328 (5th Cir., Unit B, 1980). 757 F.2d at 1189. However, the Eleventh Circuit rejected the Fifth Circuit's "but for" test used to establish the causal connection prong by stating:

> We do not construe the "causal link" in the Whatley formula to be the sort of logical connection that would justify a prescription that the protected participation in fact prompted the adverse action. Such a connection would rise to the level of direct evidence of discrimination, shifting the burden of persuasion to the defendant. Rather, we construe the "causal link" element to require merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated.

757 F.2d at 1189.

The minimalist approach used by the Eleventh Circuit at the prima facie case stage of the burden of proof not only mirrors the approach used by this Court in the *McDonnell Douglas* decision, but it also mirrors the approach used by most other circuits. *See Mitchell*, 759 F.2d at 86 ("initial burden is not great. Plaintiff merely needs to establish facts adequate to permit an inference of retaliatory motive."); *Tomka*, 66 F.3d at 1308 (the prima facie burden is "de minimis.") (internal quote omitted). Unfortunately, the Eighth Circuit has departed from this reasonable approach and has now raised the threshold for establishing the causal connection prong to a level where it is nearly impossible to prove with anything short of direct evidence of a retaliatory motive.

B. THE EIGHTH CIRCUIT'S PRESENT DECISION THAT PETITIONERS MUST DEMONSTRATE MATERIAL ADVERSE ACTIONS CONFLICTS WITH DECISIONS RENDERED BY OTHER CIRCUITS

In addition to requiring direct evidence to prove the causal connection prong, the Eighth Circuit has similarly raised the threshold for what constitutes an adverse act under the second prong of a prima facie retaliation case. In the present decision, the Eighth Circuit required that the Petitioners demonstrate that they had a "right" not to be adversely treated. (App. at 5). When the Petitioners allegedly could "point to no law, custom, or practice that gives them such a right" not to be treated adversely, the Eighth Circuit found that an adverse act had not occurred that substantiated the adverse action prong.

The Eighth Circuit's requirement that the adverse act visited upon an employee rise to a higher level of adversity is indicative of yet another split between the circuits regarding the prima facie case necessary for retaliation. This split was recently recognized by Judge Posner of the Seventh Circuit Court of Appeals in *McDonnell v. Cisneros*. 84 F.3d 256 (7th Cir. 1996). In *McDonnell*, Chief Judge Posner recognized the split in the circuits by stating that:

> There is, however, a tension in the cases . . . with respect to whether more is required in a retaliation case under Title VII . . . , the more being something that can be described as a "materially adverse employment action."

84 F.3d 256 (cites omitted). This "tension" between the circuits has been illustrated in decisions rendered by the Seventh, Eighth, and Eleventh Circuits which have found (as it was in the present decision) that employees must demonstrate that any adverse actions taken against them rise to a level where they are material (*i.e.* the employee suffers a violation of a right or tangible benefit) before the adverse action prong of a prima facie case could be proven. *See, e.g., Flaherty v. Gas Research Institute,* 31 F.3d 451, 456 (7th Cir. 1994); *Harlston v. McDonnell Douglas Corp.,* 67 FEP Cases 762 (8th Cir. 1994); *Wu v. Thomas,* 996 F.2d 271, 273-274 (11th Cir. 1993).

However, other circuits have rendered decisions that conflict with the Eighth Circuit's present decision by allowing a plaintiff to establish the adverse action prong by merely showing that they have been adversely impacted by the employer's actions. *Passer v. American Chemical Soc'y,* 935 F.2d 322, 331 (D.C.Cir. 1991) (In finding that ADEA and Title VII anti-retaliation provisions are "parallel," the Court stated that the adverse action prong can be established by a showing that "the employer . . . engaged in conduct having an adverse impact on the plaintiff.") (internal quotes omitted). This lower threshold is in line with Congressional intent that anti-retaliation provisions do not limit their reach to "only acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Id.*

The Seventh and Eleventh Circuits have recently demonstrated ambivalence regarding their prior decisions that required the plaintiff to demonstrate material

adverse acts to prove the adverse action prong.[8] These circuits have now recognized that adverse actions can "come in many shapes and sizes." *Knox*, 93 F.3d 1327. Nonetheless, the Eighth Circuit has not found likewise and has continued to render decisions (including the present decision) that require a plaintiff at the prima facie stage of the burden of proof to not only introduce direct evidence of a causal connection but to also introduce evidence that they have a right under "law, custom or practice" not to be treated adversely. (Appendix at 4).

To take the Eighth Circuit's continuing stream of decisions to their logical conclusion, it would appear that at-will employees in this circuit who are terminated in retaliation for exercising their rights under Title VII will soon have no legal recourse because they cannot direct the Eighth Circuit to any "right" that they have to be employed. Certainly, this is an absurd and unlikely result, however, it does demonstrate the need that this Court establish boundaries for the Courts of Appeal (specifically the Eighth Circuit) to follow concerning the prima facie case necessary for plaintiffs to avoid dismissal of their retaliation claims as a matter of law.

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[8] *See Knox v. State of Indiana*, 93 F.3d 1327 (7th Cir. 1996) ("There is nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint. . . . No one would question the retaliatory effect of . . . depriving the person of previously available support services (like secretarial help or a desktop computer) . . . "); *Edwards v. Board of Regents of the University of Georgia*, 62 FEP Cases 1509, 1511 (11th Cir. 1993) (Court found that evidence of lower salary increases and lost teaching opportunities was sufficient to establish adverse action prong.).

CONCLUSION

The decision in the case sub judice is in direct conflict with not only decisions in other Courts of Appeal, but also with the Supreme Court's decision in *McDonnell Douglas*. The necessity of ensuring conformity in the application of Title VII is something that the Supreme Court has recognized numerous times throughout the last three decades. However, this Court has yet to decide definitively what constitutes a prima facie case of retaliation under Title VII, thus resulting in the circuits rendering conflicting decisions.

Granting this Petition would allow this Court the opportunity to resolve the conflicting decisions rendered by the Courts of Appeal regarding the prima facie case necessary for *retaliation* in violation of Title VII, as this Court previously did for the prima facie case necessary for *discrimination* in violation of Title VII. To deny this petition would only encourage the Eighth Circuit to continue raising the threshold that a plaintiff must first meet to prove retaliation, all in direct conflict with other circuits' decisions and this Court's prior *McDonnell Douglas* decision. Accordingly, for the reasons set forth herein, the Petitioners pray that this Court will grant this Petition for Writ of Certiorari, and ultimately reverse the decision

rendered by the Eighth Circuit on the Petitioners' retaliation claim or remand this case to the Eighth Circuit for consideration in light of this Court's findings.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 95-2873/2875/3170/3288

Pauline Brine, Elizabeth Pelton, and Nancy Thompson,	*	
Appellees/ Cross-Appellants,	*	Appeals from the United States District Court for the Southern District of Iowa.
v.	*	
University of Iowa and Iowa State Board of Regents,	*	
Appellants/ Cross-Appellees.	*	

Submitted: May 16, 1996

Filed: July 19, 1996

Before McMILLIAN, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

Pauline Brine, Elizabeth Pelton, and Nancy Thompson were tenured associate professors in the dental hygiene program at the University of Iowa. In 1991,

the dental hygiene program, leading to a baccalaureate degree after four years of study, was a separate department within the College of Dentistry, and Professor Brine was the chair of the department. All of the faculty and students in the dental hygiene program were women.

Early in 1991, according to the plaintiffs, the university president and the dean of the College of Dentistry decided to eliminate the dental hygiene program from the university's offerings, but they did not tell the faculty at that time. The dean made a public recommendation to that effect to the university in September, 1991. The plaintiffs objected to that recommendation. We assume, without deciding, that the plaintiffs framed at least some of those objections in terms of sex discrimination. After various committees, both inside and outside the university, reviewed the recommendation, the Board of Regents voted in April, 1992, to close the dental hygiene program. Three of the four tenured faculty members then filed sex discrimination charges with the relevant federal and state agencies. A month later, the dean announced the phase-out plan for the dental hygiene program. The four tenured faculty members from that program then moved into another department within the College of Dentistry. Students already enrolled in the program were permitted to continue until they graduated; no new students were enrolled after April, 1992.

Three of the four tenured faculty members subsequently sued the university and its Board of Regents (which we treat collectively as "the university"), alleging sex discrimination. The causes of action were based on the first and fourteenth amendments (through 42 U.S.C. § 1983), Title VII (of the Civil Rights Act of 1964), Title IX

(of the Education Amendments of 1972), the Iowa constitution, and the Iowa civil rights statutes. The plaintiffs also alleged retaliation by the university (for their allegations of sex discrimination in the recommendation and decision to close the dental hygiene program), actionable under Title VII, Title IX, and the Iowa civil rights statutes.

At a 12-day mixed bench/jury trial in 1995 before a magistrate (by consent of the parties), the trial court found for the university on all Title VII and Title IX claims that arose before November, 1991 (when the right to a jury trial on disparate treatment claims became effective), and on the disparate impact claim based on Title VII, Title IX, and state law. The jury found for the university on the disparate treatment claim based on Title VII, Title IX, and state law. The trial court granted judgment as a matter of law to the university on the fourteenth amendment and equivalent Iowa constitutional claims (due process, equal protection). The jury found for the plaintiffs on the first amendment and equivalent Iowa constitutional claims and on one retaliation claim (lower salary increases), but the trial court granted judgment as a matter of law to the university on each of those verdicts.

The jury found for the plaintiffs on the remaining retaliation claims and awarded damages of $65,000 to each plaintiff; the trial court awarded attorneys' fees and costs of approximately $227,800 to the plaintiffs. The university appeals, arguing that, as a matter of law, it took no "adverse employment action" that could be considered retaliation for allegations of sex discrimination. We agree. We thus reverse the judgment of the trial court

on the retaliation claims and direct the trial court to enter judgment for the university on those claims.

The plaintiffs cross-appeal the trial court's verdict for the university on the disparate impact claim, the denial of judgment as a matter of law on the disparate treatment claim, and the grant of judgment as a matter of law on the due process, first amendment, and salary-related retaliation claims. The plaintiffs also cross-appeal the trial court's refusal to admit into evidence a complete copy, rather than just a summary, of an opinion on an earlier sex discrimination case against the university; the trial court's refusal to instruct the jury separately on Title VII and Title IX; and the trial court's refusal to submit to the jury, as a state-law claim, the disparate impact issue. We affirm the judgments of the trial court with respect to all of those issues, and, accordingly, we vacate the trial court's award of attorneys' fees and costs to the plaintiffs.

I.

To prevail on a retaliation claim, the plaintiffs must prove that they engaged in protected activity and that they suffered an adverse employment action as a result of that activity. *See, e.g., Evans v. Kansas City, Missouri, School District*, 65 F.3d 98, 100 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996). The plaintiffs characterize the following actions as retaliation for their complaints that sex discrimination played a part in the recommendation and decision to close the dental hygiene program – (1) exclusion from the various committees that reviewed the recommendation to close the program and exclusion from

participation in planning for the phase-out of the program; (2) the abolition of the department as an administrative unit as of mid-1992 rather than as of mid-1995, when the last dental hygiene students graduated; and (3) the change in Professor Brine's title from "chair" of the "department" to "coordinator" of the "program," along with a loss of secretarial help, a requirement that she have her department chair's permission to order supplies, and a requirement that, as coordinator of the program, Professor Brine communicate "program concerns" to a committee rather than directly to the dean.

With respect to the plaintiffs' alleged exclusion from the various review committees and the process of planning for the phase-out of the program, the plaintiffs have directed us to nothing that establishes their right to be so included. They point to no law, custom, or practice that gives them such a right. We note, moreover, that each plaintiff testified before at least one of the review committees. Finally, we see no evidence other than timing tending to establish that the challenged exclusions of the plaintiffs were *because* of their allegations of sex discrimination. Timing alone is not enough in the circumstances of this case. *See, e.g., Nelson v. J.C. Penney Company, Inc.*, 75 F.3d 343, 346-47 (8th Cir. 1996), *petition for cert. filed* (U.S. May 20, 1996). Without a causal connection between the plaintiffs' allegations of sex discrimination and the alleged exclusions, the plaintiffs lose, as a matter of law. *See, e.g., Evans*, 65 F.3d at 100.

With respect to the university's decision to abolish the dental hygiene department as an administrative unit, rather than retaining it until mid-1995, when the remaining dental hygiene students graduated, the plaintiffs

again have directed us to no law, custom, or practice that requires the department to be retained. Nor do we see any evidence tending to establish that the university's decision in that regard was motivated by sex discrimination. Without such evidence, the plaintiffs lose, as a matter of law. *Id.*

Finally, with respect to the change in Professor Brine's title and the new administrative procedures instituted, we view all of those events as inevitable consequences – or side effects, so to speak – of the decision to close the dental hygiene department. We see no evidence that would support the theory that those events were caused by sex discrimination by the university. Without such evidence, the plaintiffs lose, as a matter of law. *Id.*

II.

The plaintiffs alleged a disparate impact claim under Title VII, Title IX, and state law. The trial court granted judgment to the university on all of those claims. On cross-appeal, the plaintiffs first assert that the seventh amendment gave them a right to a jury trial on the state-law claim. The seventh amendment guarantees the right to a jury for all "Suits at common law" where more than twenty dollars is at stake. *See* U.S. Const. amend. VII. We need not reach this question, however, because we hold that the plaintiffs failed to make a submissible case with respect to their state-law disparate impact claim.

The Iowa courts have held that the state civil rights statutes, *see* Iowa Code Ann. § 216.6.1.a, § 216.9.1, § 216.9.3, are "patterned after Title VII." *Smith v. ADM Feed Corp.*, 456 N.W.2d 378, 382 (Iowa 1990). The Iowa

courts also characterize the federal case law on Title VII as "instructive," *Annear v. State*, 419 N.W.2d 377, 379 (Iowa 1988), with respect to the state civil rights statutes. We therefore consider the federal case law on Title VII in evaluating the plaintiffs' state-law disparate impact claim.

The trial court found that the decision to close the dental hygiene program was "part of a [year-long] process relating to the University's strategic plan." The goal of the strategic plan is "to strengthen undergraduate education, selected professional and graduate programs, and the diversity of the University community." It seems to us that the "challenged practice" in this case, *Wards Cove Packing Company, Inc. v. Atonio*, 490 U.S. 642, 659 (1989), is actually the use of the strategic plan. We hold, as a matter of law, that no reasonable juror could find that the use of the strategic plan in question does not "serve[ ], in a significant way, the legitimate . . . goals" of the university, *id.*

The plaintiffs offered no evidence relative to an "alternative . . . practice," *see* 42 U.S.C. § 2000e-2(k)(1)(A)(ii), § 2000e-2(k)(1)(C), that could substitute for the use of the strategic plan. The university was therefore entitled to judgment as a matter of law on the state-law disparate impact claim. *See, e.g., MacPherson v. University of Montevallo*, 922 F.2d 766, 772 (11th Cir. 1991), and *Dwyer v. Smith*, 867 F.2d 184, 189 (4th Cir. 1989). That disposition thus moots the issue of whether a jury trial was required on the state-law claim. For the same reasons, the trial court was correct in granting judgment as a matter of law to the university on the federal disparate impact claim.

III.

The jury found for the university on the disparate treatment claim. On cross-appeal, the plaintiffs essentially argue that because the university gave different reasons for closing the dental hygiene program at different times (cost, lack of centrality), the plaintiffs proved pretext. We have read the entire trial transcript. The issue was clearly a submissible one, and we therefore refuse to disturb the jury verdict.

IV.

The trial court held, as a matter of law, that the university and the Board of Regents were immune, under the eleventh amendment, from suit on the due process and first amendment claims (brought through 42 U.S.C. § 1983). The plaintiffs argue on cross-appeal, first, that the trial court's legal analysis was wrong and, second, that the acts complained of were proprietary functions, not governmental ones, and therefore should not be subject to immunity.

Because the plaintiffs asked only for damages and not for injunctive relief on the claims under 42 U.S.C. § 1983, the trial court was correct in its legal analysis. *See, e.g., Sherman v. Curators of the University of Missouri*, 16 F.3d 860, 863-65, 865 n.6 (8th Cir. 1994); *see also Van Pilsum v. Iowa State University*, 863 F. Supp. 935, 936-40 (S.D. Iowa 1994). The plaintiffs' proprietary/governmental argument, moreover, goes to the question of *sovereign* immunity, not *eleventh amendment* immunity, *see, e.g., Sherman*, 16 F.3d at 862 n.2, although whether a state has waived its sovereign immunity is one of the criteria to be

considered in determining the issue of eleventh amendment immunity, *see, e.g., id.* at 864, 864 n.5, 865 n.6. In any event, hiring and firing employees (and, by analogy, establishing and closing departments) are governmental, not proprietary, functions. *See, e.g., Nichols v. City of Kirksville*, 68 F.3d 245, 247 (8th Cir. 1995).

V.

The jury found for the plaintiffs on the retaliation claim tied to lower salary increases, but the trial court granted judgment as a matter of law to the university on that claim. The basis for that ruling was the trial court's determination that because the plaintiffs' comparison of salary increases was based on noncomparable sources for salary payments (*i.e.*, the other faculty members in the College of Dentistry were eligible for money from the dental clinic operated by the university, grants, and contracts, but the faculty members from the dental hygiene program were not so eligible), the plaintiffs failed to offer sufficient evidence of a disparity in salary increases.

On cross-appeal, the plaintiffs essentially reargue the evidence. We agree with the trial court that the comparison of salary increases offered by the plaintiffs was insufficient, as a matter of law. The plaintiffs therefore failed to show an adverse employment action by the university, and, accordingly, there is no error in the trial court's ruling.

VI.

The plaintiffs argue on cross-appeal that instead of reading only the summary of the opinion in *Jew v. University of Iowa*, 749 F. Supp. 946 (S.D. Iowa 1990), an earlier

case in which the university was found liable for sex discrimination, the trial court should have allowed the jury to see the whole opinion. We agree with the court's post-trial assessment that because the facts and the legal theory in the earlier case were so different from those in this case, references to the earlier case should not have been allowed at all. *See, e.g., Bradford v. Norfolk Southern Corp.*, 54 F.3d 1412, 1418-19 (8th Cir. 1995). We therefore reject the plaintiffs' argument on that issue.

VII.

Title VII (of the Civil Rights Act of 1964) proscribes sex discrimination "with respect to . . . compensation, terms, conditions, or privileges of employment." *See* 42 U.S.C. § 2000e-2(a)(1). Title IX (of the Education Amendments of 1972) proscribes sex discrimination with respect to "participation in" or "the benefits of . . . any education program" receiving federal money. *See* 20 U.S.C. § 1681(a). The federal regulations on Title IX construe its prohibitions as applying to "promotion, . . . demotion, transfer," *see* 34 C.F.R. § 106.51(b)(2), "[j]ob assignments, classifications and structure, including position descriptions," *see* 34 C.F.R. § 106.51(b)(4), and "[a]ny other term, condition, or privilege of employment," *see* 34 C.F.R. § 106.51(b)(10). The university does not challenge the proposition that a private right of action exists under Title IX. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 689, 709, 717 (1979).

On cross-appeal, the plaintiffs contend that because the language of the two statutes (especially as amplified in the regulations applicable to Title IX) is slightly different, the elements of proof are slightly different and, thus,

that the trial court should have instructed the jury separately as to each of those claims. Our court has remarked that "to the degree [a plaintiff] relies upon teaching conditions, such as course assignments," a Title IX claim "merely duplicates" a Title VII claim. *O'Connor v. Peru State College*, 781 F.2d 632, 642 n.8 (8th Cir. 1986). Other circuits have explicitly declared that for employment discrimination cases, "the Title VII standards for proving discriminatory treatment should apply to claims arising under Title IX." *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 896 (1st Cir. 1988); *see also Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 206-07 (4th Cir. 1994), and *Mabry v. State Board of Community Colleges and Occupational Education*, 813 F.2d 311, 316-17 n.6 (10th Cir. 1987), *cert. denied*, 484 U.S. 849 (1987). We are persuaded by those opinions and therefore uphold the trial court's action.

VIII.

For the reasons stated, we reverse the trial court's judgment for the plaintiffs on the retaliation claims and direct the trial court to enter judgment for the university on those claims. We affirm the trial court's judgments on all of the other issues discussed and, accordingly, vacate the trial court's award of attorneys' fees and costs to the plaintiffs.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PAULINE BRINE, ELIZABETH PELTON, and NANCY THOMPSON, Plaintiffs, vs. THE UNIVERSITY OF IOWA, and the IOWA BOARD OF REGENTS, Defendants.	:	CASE NO. 4-94-CV-20688 OPINION AND JUDGMENT (Filed May 5, 1995)

This matter came before the Court for trial April 10-25, 1995. Certain issues were presented to a jury for consideration, and the Court now has under advisement the issues of whether Defendants' employment decisions caused a disparate impact on women, and the pre-November 21, 1991 issues relating to Plaintiff's Title VII claims. The jury returned its verdict on April 27, 1995. The parties agreed to one judgment entry for the entire case based upon the verdict and the Court's findings.

I. BACKGROUND

A. Stipulated Facts and Claims

The parties have stipulated to the following facts:

In April 1992, the Iowa Board of Regents voted to close the Department of Dental Hygiene in the College of Dentistry at the University of Iowa. The closing resulted in no new students for the fall of 1992 starting class, and

will be concluded with the graduation of the last class of students in May 1995. This is the only four-year baccalaureate degree program in Dental Hygiene in Iowa. The first class of Dental Hygiene students was admitted to the University of Iowa in 1953.

The Dental Hygiene Department was originally affiliated with the University's College of Liberal Arts, and degrees are still conferred by that College. The Department consists solely of female students, female facility, and female alumnae. All three plaintiffs, Pauline Brine, Elizabeth Pelton and Nancy Thompson, are currently tenured professors in the Dental Hygiene Department of the College of Dentistry; Brine has been the Department Chair since 1969. Elizabeth Pelton, an assistant professor since 1974, was promoted to associate professor in April 1980. Nancy Thompson, an assistant professor since 1980, was appointed to associate professor in 1986.

Once the recommendation was made to close the Department, the Defendants contend an exhaustive planning process was undertaken at the College and University levels and the decision to close the Department was recommended to the Regents. The Regents voted to close the Dental Hygiene Department on April 15, 1992; Plaintiff's complaints of discrimination with the EEOC and ORC were filed soon after in May 1992, alleging that the Defendants violated their rights by closing a program with an all-female faculty and student body.

Defendants contend that the closure of the Dental Hygiene Department was necessary when the program was assessed against the strategic planning criteria developed within the College and the University. They also

contend that none of the Plaintiffs has been harmed because all continue to receive pay and benefits.

All three Plaintiffs are still employed with the University in the College of Dentistry. However, they allege that the decision to close the Department was made for discriminatory reasons based upon their sex, that their first amendment, equal protection and due process rights were violated by the manner in which the decision to close the Department was made, and that they were retaliated against for objecting to violations of their rights. Plaintiffs also allege that their pay raises since 1992 have been affected, that plans for their future assignments and responsibilities have not been made, and that these violations of their rights have caused them to suffer emotional and physical distress.

B. Additional Facts

The Court finds the following additional facts:

In 1991 Dean McLaran of the College of Dentistry [the College] at the University of Iowa [the University] made a recommendation to University administrators that the Dental Hygiene Department, which was located in the College, be closed. Although the Dental Hygiene degrees were conferred by the University's College of Liberal Arts, it was housed and offered all of its classes in the College of Dentistry. Students attended their first two years in general liberal arts classes, and completed their last two years at the Department of Dental Hygiene.

Once the closure recommendation by the Dean was made, the University Strategic Planning Steering Committee [the Committee], comprised of the University President, four Vice Presidents and a faculty member, requested that the Dean convene a review process for the Department of Dental Hygiene. The Dean appointed an Ad Hoc Committee [AHC] comprised of seven members from the College of Dentistry, and four from the University at large, including the Associate Dean of the College of Liberal Arts and a former law Dean who had served as acting Vice President for Academic Affairs. The AHC met throughout the fall of 1991, held hearings, and took testimony, including receipt of testimony and supporting documents from the Plaintiffs. In November of 1991 the AHC submitted its report, which unanimously recommended to the Committee that the Department of Dental Hygiene close, based upon the AHC's findings as to the centrality and quality of the Department.

The review of the Dental Hygiene Department was part of a process relating to the University's strategic plan, as well as implementation of the Committee's "Criteria for Institutional Enhancements and Reductions" which it published in August, 1991. Throughout 1991, at the direction of the Committee, more than 30 programs and administrative functions of the University were evaluated to increase efficiency. This evaluation overlapped analysis which was being conducted in the first half of 1991 in response to University budget problems which had arisen in light of a requirement to return a certain portion of previously allocated funds to the Iowa General Assembly. University administration required each College Dean to develop plans for returning various amounts

of money, primarily from the "GEF" or General Education Funds allocated to the University by the state legislature. This budget crisis resulted in the elimination of 500 jobs at the University, primarily through attrition. No tenured faculty member has ever been "laid off" from the University.

The Committee reviewed the AHC recommendation, along with those made by other Colleges and Departments. The Committee investigated whether all of the program modifications resulted in a disparate impact on women students or faculty, and determined that they did not.

In November 1991, the University recommended to the Board of Regents that certain programs be changed, including closure of the Dental Hygiene Department. Representatives of the Dental Hygiene faculty and dental hygiene practitioners appeared at the December 1991 Regents' meeting and objected to this recommendation.

At this meeting, the Regents adopted the recommendations of the University on the elimination or reduction of nine other programs at the University, including some that affected programs with predominantly male faculty or students, and some programs in which women faculty or students predominated. The Regents demanded further study before making a decision about the Department of Dental Hygiene, but adopted the University's recommendations as to the other nine proposed actions.

As a result, the Board of Regents appointed a special External Review Committee [ERC] of health science educators from other institutions to examine the fairness of the AHC review process, as well as the substance of the

decision. The ERC reviewed the records of the AHC, took testimony, and received materials from the Dental Hygiene faculty and members of the public. Two of the three members of the ERC committee supported the University's recommendation, and one (a dental hygienist) dissented. The ERC had some criticism of the AHC process. Based on the Committee's Criteria for Institutional Enhancements and Reductions and the University's Strategic Plan, the ERC found that the Dental Hygiene Department did not sufficiently support the criteria of "centrality" and thus could be eliminated. Although Plaintiffs dispute the conclusions drawn by the Dean, the AHC, the Committee and the ERC, each of these groups concluded that the Dental Hygiene Department was not sufficiently central to the University's mission to justify its continued support. On April 15, 1992 the Board of Regents met to receive the ERC report. A majority of the Regents authorized the University to promptly close the Department of Dental Hygiene and phase out its educational programs, so that the last class graduated in the spring of 1995. The Department of Dental Hygiene was closed as an administrative unit effective June 30, 1992, and all four of the Dental Hygiene faculty's temporary academic homes became the Department of Preventative and Community Dentistry in the College of Dentistry. Brine continues to serve as the Director of the Program, but was removed as Department Chair when the Department closed June 30, 1992. All Plaintiffs have retained tenure, as well as their academic titles and salaries, and have continued to teach classes. Their future responsibilities, as far as specific class assignments, are not clear. The parties continue to negotiate the question of

permanent "academic homes," along with program and research assignments for Plaintiffs.

In May 1992 the Plaintiffs filed their administrative complaints with the Iowa Civil Rights Commission and EEOC alleging sex discrimination and retaliation by the April 15, 1992 Board of Regents' decision to close the Department of Dental Hygiene. This suit was filed in April 1993, and was amended in January 1995 to expand their claims of retaliation relating to post-filing incidents. Plaintiffs have alleged violations of federal and state constitutional and statutory provisions. Plaintiffs have alleged violations of Title VII and Iowa Code Chapter 216 (1993) for disparate treatment and disparate impact; Title IX for discrimination in employment opportunities; retaliation; and 42 U.S.C. § 1983 for claims of equal protection, due process and first amendment constitutional infringements.

Plaintiffs have maintained that the decision to close the Department of Dental Hygiene is the employment practice which has caused a disparate impact on them, as female faculty members. Plaintiffs have always included the claim of the disparate impact on the Department of Dental Hygiene itself, which has historically been predominantly female in both its faculty and students (there have never been male graduates or faculty of the Department). The College of Liberal Arts at University of Iowa has approximately 19,500 students (4,000 graduate and 15,500 undergraduate), and about 50 percent of its student body is male and 50 percent is female. Overall, about 25-30 percent of the University faculty is female.

II. LEGAL ANALYSIS

Plaintiffs maintain that Defendants discriminated against them in violation of Title VII (42 U.S.C. 2000e), Title IX (20 U.S.C. 1681) and the Iowa Civil Rights Act (Iowa Code Chapter 216), by disparate impact against women because of the closure of the Department of Dental Hygiene in the College of Dentistry. To establish a prima facie case under the disparate impact theory, Plaintiffs must demonstrate that a facially neutral employment practice operated to exclude a disproportionate number of members of a protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 799 (8th Cir. 1993).

The Civil Rights Act of 1991 codified the burden of proof in a disparate impact action. An illegal employment practice based on disparate impact is established only if Plaintiffs can show that the Defendants used a particular employment practice that caused a disparate impact on the basis of race, color, sex, religion or national origin and the Defendants failed to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000(e)-2(k)(1)(A)(i). The 1991 Civil Rights Act shifted the burden of demonstrating business necessity and job relatedness back on to Defendants, reversing the burden of proof of framework set forth in *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

The 1991 Act further provides:

> With respect to demonstrating that a particular employment practice causes a disparate

> impact . . . , the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, the decision-making process may be analyzed as one employment practice.

42 U.S.C. § 2000e-2(k)(1)(B). In this case, Plaintiffs have pointed to the April 15, 1992 Board of Regents' vote to close the Department of Dental Hygiene as the particular employment practice causing disparate impact. The Plaintiffs have not demonstrated that the elements of the University's or Regents' decision-making processes are not capable of separation for analysis. The Court does not view the decision-making processes which took place in discrete steps commencing April 1991 through April 1992 as one employment practice.

The recommendations of the University to the Board of Regents, which occurred in December of 1991 through April of 1992, to modify or close ten programs had an impact on more than merely the Department of Dental Hygiene and the women professors therein.

Plaintiffs view the impact of the Regents' decision as one affecting only them (although they have referred to claims more appropriately raised by students) and thus argue that they have demonstrated that this employment practice caused a disparate impact. It is clear that the recommendations made by the University to the Regents, some of which were adopted by the Regents, affected more than just women. The other nine recommendations

adopted by the Regents affected both men and women. Therefore, Plaintiffs have not established a prima facie case that there has been a disparate impact on a disproportionate number of women by the closing decisions made by the Board of Regents. *See Wards Cove Packing Co. v. Antonio,* 490 U.S. 642, 657 (1989).

Although Defendants argue to the contrary, the April 1992 decision relating only to the Department of Dental Hygiene could be examined as a single employment practice causing disparate impact, as opposed to an event of disparate treatment. Plaintiffs are still required to show a causal link between the disparity and the employer's practice. *See Nolting v. Yellow Freight Systems, Inc.,* 799 F.2d 1192, 1199 (8th Cir. 1986); *State, County and Municipal Employees Council 31 v. Ward,* 978 F.2d 373, 378 (7th Cir. 1992); *Watson v. Fort Worth Bank and Trust,* 487 U.S. 977, 994-95 (1988). Plaintiffs must do more than show an employer practice and a disparity. *Wards Cove,* 490 U.S. 642, 656 (1989). Plaintiffs must show a pattern significantly different from that of others similarly situated. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975). The Plaintiffs have not demonstrated a causal link between the disparity and practice even if this closing decision is analyzed as a single employment decision. If causation is not shown, then the Defendants need not prove business necessity. 42 U.S.C. § 2000e(k)(1)(B)(ii).

Even assuming a prima facie case had been established, Defendants demonstrated that the challenged practice is job related for the position in question and consistent with business necessity. 42 U.S.C. 2000e(k)(1)(A)(i). "The dispositive issue is whether the

challenged practice serves in a significant way the legitimate employment goals of the employer." *Wards Cove*, 490 U.S. at 659; *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587 (1979).

The University's Strategic Planning Committee determined centrality to be a primary factor in the decision to retain or modify an academic program. The concept of centrality is defined as "the degree to which the body of knowledge created and disseminated by a program or discipline is critical or necessary to teaching, research and/or service at the University," according to the Committee's criteria. Centrality impacts on the academic aspects of a program, and by inference, the economic support for such programs. If a program is not central to the overall mission of the University or the College of Dentistry, the priority for supporting it economically is going to be less than for those programs which are determined to be central to the mission.

The Defendants have demonstrated a business necessity for the closure decision. The requirement that the program be related to the University's mission is job-related and tied to the requirements of performing the job in question.

Further, Plaintiffs have not demonstrated that there exists another alternative practice which does not have a similar discriminatory effect, and which would also serve the employer's legitimate interest. Plaintiffs have suggested that they could have reduced their salaries for a year, or that other departments of the College of Dentistry could have been restructured or eliminated which would have allowed the continued operation of the

Department of Dental Hygiene. Plaintiffs have not demonstrated that these alternatives would be equally effective in achieving the legitimate employment goals, particularly considering the costs and other burdens of the proposed alternative restructuring. Even if the court were to determine restructuring elsewhere in the College of Dentistry was a non-discriminatory alternative, this is insufficient to show that the decision to close the Department of Dental Hygiene was pretextual. *Gillespie v. Wisconsin*, 771 F.2d 1035, 1045-46 (7th Cir. 1985), *cert. denied*, 474 U.S. 1083 (1986); *Lamphere v. Brown University*, 875 F.2d 916, 924-25 (1st Cir. 1989).

III. THE JURY VERDICT

This case was tried to a jury under the claims which were impacted by the 1991 amendments to the Civil Rights Act to Title VII. The Court will be guided by the legal principles set out in Instruction No. 3 and the jury's verdict in the determination as to whether there was disparate treatment of the Plaintiffs. To show disparate treatment, the Plaintiff was required to show that the Defendants treated Plaintiffs adversely in the terms and conditions of their employment, and that sex was a motivating factor in the Defendants' decisions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The jury returned a verdict, and the court also finds, that there was no intentional discrimination relating to the disparate treatment claims presented under 42 U.S.C. § 1983 equal protection, Title VII, Title IX, and Iowa Code Chapter 216 (1993).

The jury was asked to indicate which of its damages occurred pre-Act and which were calculated to accrue post-Act in order to aid the Court in its determination. Because the jury found no disparate treatment, no damages were accrued. The Court makes a similar finding that there was no disparate treatment of the Plaintiffs prior to November 21, 1991.

The Plaintiffs also made claims of retaliation. The Plaintiffs bear the burden to prove that they were engaged in statutorily protected activity, that they suffered adverse employment action, and that there was a causal connection between the two. *Jackson v. St. Joseph State Hospital,* 840 F.2d 1387, 1390 (8th Cir.), *cert. denied,* 488 U.S. 892 (1988). The jury, which returned for Plaintiffs only on the claim of retaliation, found the majority of these damages to have accrued post-November 21, 1991. The jury found that the retaliation resulted in lost wages and emotional distress. This finding is not inconsistent with the Court's determination that the practice in question was the closure decision which occurred April 15, 1992, or the fact that the complaint of civil rights violation was not filed until May of 1992 and this lawsuit not filed until May of 1993. The Court will be guided by the jury's verdict regarding damages that accrued before November 21, 1991, and adopts the jury's finding on retaliation which occurred pre-Act.

The jury also awarded nominal damages of $1.00 per Plaintiff based upon a finding that their First Amendment rights had been violated.

IV. JUDGMENT ENTRY

Based upon the foregoing Findings of Fact and Conclusions of Law, and the jury verdict in this case, IT IS HEREBY ORDERED that judgment is entered as follows:

1. On Plaintiffs' claims based on 42 U.S.C. § 1983 equal protection, Title VII, Title IX and Iowa Code Chapter 216 relating to disparate treatment, judgment is entered in favor of Defendants;

2. On Plaintiffs' claims based upon Title VII relating to disparate impact, judgment is entered in favor of Defendants;

3. On Plaintiffs' claims on the issue of retaliation pursuant to Title VII, Title IX and Iowa Code Chapter 216, judgment is entered in favor of Plaintiffs in the following amounts: a) Pauline Brine: total of $72,655.00, comprised of $7,655.00 in lost wages and $65,000.00 for emotional distress; b) Elizabeth Pelton: total of $72,770, comprised of $7,770.00 in lost wages and $65,000,00 for emotional distress; and c) Nancy Thompson: total of $69,211.00 comprised of $4,211.00 for lost wages and $65,000.00 for emotional distress.

4. On Plaintiffs' claims for violation of their civil rights under the First Amendment pursuant to 14 U.S.C. § 1983 judgment is entered in favor of: a) Pauline Brine: $1.00; b) Elizabeth Pelton: $1.00; and c) Nancy Thompson: $1.00.

5. Interest is awarded according to statute. Plaintiffs shall file the appropriate attorney fee application as required by statute and Local Rule 22.

IT IS SO ORDERED.

Dated this 5th day of May, 1995.

/s/ Celeste F. Bremer
CELESTE F. BREMER
CHIEF UNITED STATES
MAGISTRATE JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2873/2875/3170/3288SIDM

Pauline Brine, et al.,	*	
	*	
Appellees/Cross-Appellants,	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
vs.	*	
University of Iowa and Iowa State Board of Regents,	*	
	*	
Appellants/Cross-Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 20, 1996

Order Entered at the Direction of the Court:

/s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
JAN 22 1997
CLERK

No. 96-994

In The

Supreme Court of the United States

October Term, 1996

PAULINE BRINE, ELIZABETH PELTON and NANCY THOMPSON,

Petitioners,

vs.

THE IOWA BOARD OF REGENTS AND THE UNIVERSITY OF IOWA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the court of appeals correctly concluded, viewing the record evidence in the light most favorable to Petitioners, that the evidence at trial failed to demonstrate an "adverse employment action."

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BRIEF IN OPPOSITION

The Respondents the Iowa Board of Regents and the University of Iowa, respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on July 19, 1996.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is included as an appendix to the petition and has been published as *Brine v. University of Iowa*, 90 F.3d 271 (8th Cir. 1996).

In addition, the trial court's Opinion and Judgment filed May 5, 1995, is also included as an appendix to the petition. The trial court's Order ruling on post-trial motions dated June 15, 1996 is included in the appendix to this Brief in Opposition.

STATEMENT OF THE CASE

This case arose from an April 1992 decision by the State Board of Regents ("Regents") to close the department of dental hygiene and phase out the dental hygiene training program at the University of Iowa ("University"), one of five state educational institutions under Regents' control.

That decision was the culmination of a lengthy strategic planning process and a spring 1991 Regents' directive

to the University to study some 30 programs for possible reduction or enhancement. The possible closing of the dental hygiene program within the College of Dentistry was the subject of internal correspondence between the Dean of Dentistry and the University President in June 1991. The dean's recommendation and plan for closing were formally presented to the University administration in September 1991, and shortly thereafter included in a public list of programs to be studied.

An ad hoc college committee comprised of seven College of Dentistry faculty (four of whom had been trained as dental hygienists) and four senior faculty from outside the College studied the closing recommendation during the fall of 1991, collecting numerous documents and hearing testimony from a variety of viewpoints, including those of the dental hygiene faculty and other dental hygienists.

In early November 1991 the ad hoc committee unanimously recommended closing the department effective June 30, 1992. It found that the dental hygiene program was not central to the missions of the University and the College. A decline in enrollment from 80 to 36 students over the prior decade also supported the recommendation, as did the fact that similar trends had caused other similar universities to close their programs. The committee's report also recommended that students currently enrolled be permitted to complete the program and, importantly, the tenured faculty including plaintiffs be assigned to other faculty positions in the University.

The plaintiffs spoke against the proposed closing on educational grounds before the ad hoc committee and

issued a written response to the ad hoc committee report in late November 1992. It was in this response that plaintiffs raised for the first time the allegation of gender discrimination.

In December 1992, plaintiffs objected to the University's closing recommendation at a Regents' meeting and the Regents responded by creating a review committee external to the University, to study the proposal further. After a majority of this external review committee supported the decision to close the department, the Regents voted (6 to 3) to close it effective June 30, 1992.

In May 1992, plaintiffs filed complaints with the EEOC alleging that closing a department whose faculty and students were all women constituted sex discrimination. In addition, they alleged that plaintiffs had been retaliated against by excluding them from the development of alternative dental hygiene programs.

In April 1993, plaintiffs filed their initial complaint in federal court. Plaintiffs again pleaded retaliation as one of many legal theories, adding as an additional adverse employment action that they had been excluded from planning the program's phase out.

In January 1995, plaintiffs filed a Third Amended Complaint, which added the allegation that plaintiffs had been retaliated against by receiving "lower salary increases since 1992." This amendment came after defendants had moved for summary judgment on all Title VII claims on the grounds that plaintiffs had failed to create a triable issue that they had experienced any adverse employment action.

Accordingly, as of the trial in April 1995, and as reflected in plaintiffs' trial brief and proposed instructions, the specific adverse employment actions claimed by plaintiffs occurred after the Regents' decision in April 1992 and included, in addition to the actual decision to close the program, the defendants' decision "to demote Brine, bar plaintiffs from phase out planning, and to give lower than average salary increases to all plaintiffs."

As of 1995, the phase out of the department was nearly complete. The plaintiffs continued at all times to be tenured associate professors in the University. They never missed a paycheck. They received significant raises each year since the closing of the department in 1992. The terms and conditions of their employment were essentially unchanged, except that their administrative unit no longer existed. After some negotiations in summer 1992, Brine agreed to assume the title "program coordinator," with no loss of pay, benefits, change of office location, or any other tangible disadvantage. She continued to function in all respects as the academic leader of the program. The only new circumstances identified by Plaintiff Brine accompanying her change of title was that the head of preventive and community dentistry was now required to sign requisitions and she was no longer required to attend deans' meetings with all departmental executive officers ("DEOs").

Little attention at trial was given to the issue of retaliation in general, or to the specific allegations of adverse employment actions. Rather, plaintiffs spent many days attempting to produce evidence that the procedure employed by the University to consider closing

the program was flawed and that the decision was wrong on academic grounds.

There was little or no disagreement between the parties at trial on the elements of plaintiffs' disparate treatment or retaliation claims, or the application of the *McDonnell-Douglas* framework.

The University's position at trial with respect to both the disparate treatment and retaliation claims was that plaintiffs had not proved the common element of "adverse employment action." The element of "protected activity" was not in dispute because all of plaintiffs' then allegations related to events occurring after the filing of their EEOC complaint. Nor was causation a fighting issue at the trial.

With respect to salary increases, the University argued that the allegation they had been given lower than salary increases was fatally flawed both because plaintiffs had offered no evidence supporting an entitlement to an average raise (the University has a merit-based system of salary raises) and that the plaintiffs had provided no credible evidence that they had in fact received lower than average raises. The University argued that the "demotion" of Brine was no more than a change of title required by its reasonable decision to merge the hygiene department as an administrative unit into the Department of Preventive and Community Dentistry during the phase out period and that there were no materially adverse consequences to Brine from that change in title.[1]

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[1] Contrary to the suggestion at page 3 of the Petition, plaintiffs at all times had secretarial support comparable to that of their dental college colleagues.

Both with respect to its decision to close the department during phase out and its approach to phase out planning, the University properly noted that these were educational or administrative decisions and not in and of themselves employment decisions at all.[2]

The trial court submitted plaintiffs' retaliation claim to the jury with a definition of "adverse employment action" drawn from prior Eighth Circuit and Seventh Circuit decisions, without directing the jury to disregard any of plaintiffs' alleged adverse employment actions except the claim that the closing itself was such an action.

The jury returned a verdict for the University on plaintiffs' disparate treatment claim, rejecting the notion that there was discrimination in the decision to close the program or the process leading to it.

The jury returned for the plaintiffs on their retaliation claim, awarding them lost wages in the amounts they claimed their raises were deficient and $65,000 each in emotional distress damages. Implicit in that verdict was the jury's acceptance of plaintiffs' "lower than average" salary raise theory. In addition, the jury must have accepted some other notion of adverse employment action because they purported to find that approximately 10% of the plaintiffs' damage had occurred prior to November 21, 1991, the effective date of the 1991 Civil

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[2] Undisputed evidence in the record confirms that plaintiffs participated in discussions with the provost and dean concerning the phase out. Nothing in Title VII requires university administration to accept all of plaintiffs' preferences, although the plans were in fact modified in response to their expressed concerns.

Rights Act. From that point forward, considerable confusion ensued as to what plaintiffs were claiming as adverse employment actions and a causation issue entered the case. There simply had been no evidence of "protected activity" prior to November 21, 1991.

In a ruling dated June 15, 1995 (included in Respondents' Appendix to this Brief in Opposition), the trial court granted in part the University's motion for judgment as a matter of law on the retaliation claims and denied it in part. The grant related to the "lower than average salary increases:"

> The jury cannot have reasonably relied on plaintiffs' evidence to conclude that plaintiffs' salary increases were lower than "average," as there was no credible evidence presented which actually proved the "average" to which they compared themselves, or that there was an automatic entitlement to an "average" increase.

(Resp. App. 11-12.)

However, after holding that it was not an adverse employment decision to eliminate the duties of the DEO in light of the decision to eliminate the department, the trial court went on to hold that "the timing of such a decision may be an adverse employment decision." (Resp. App. 9.) Then, in a section entitled "Phase out Activities," the trial court held that limitations on plaintiffs' "active participation" in the ad hoc committee and other review processes could constitute an adverse employment action. (Resp. App. 9.) This further confused the issue, both because the term "phase out" had been used at trial exclusively in reference to post-closing

events (after June 30, 1992) and because the ad hoc committee process occurred before there was any "protected activity."

The University appealed to the Eighth Circuit the entry of judgment against it on plaintiffs' retaliation claim. The University's sole argument in that regard was that plaintiffs did not establish the element of an adverse employment action required by their Title VII retaliation claim. The University developed the arguments that it made to the trial court with respect to the "demotion" of Plaintiff Brine and the supposed inadequate participation in phase out activities. With respect to the supposed inadequacy of plaintiffs' participation in the review process, the University again pointed out that these decisions were not employment decisions at all and had occurred prior to any record evidence of protected activity. The University drew analogies to Eighth Circuit decisions in *Harlston v. McDonnell-Douglas Corp.*, 37 F.3d 379 (8th Cir. 1994), *Bradford v. Norfolk Southern Corp.*, 54 F.3d 1412 (8th Cir. 1995), and *Evans v. Kansas City, Missouri School District*, 65 F.3d 98 (8th Cir. 1995), and Seventh Circuit decisions in *Crady v. Liberty National Bank and Trust Co.*, 993 F.2d 132 (7th Cir. 1993), and *Spring v. Sheboygan Area School District*, 865 F.2d 883 (7th Cir. 1989).

In responding to the University's arguments before the circuit, plaintiffs in no way suggested that the Seventh and Eighth Circuits were somehow out of step with the rest of the country or otherwise found fault with their analytical approach. Indeed, plaintiffs cited *Flaherty v. Gas Research Institute*, 31 F.3d 451 (7th Cir. 1994) with approval. Rather, plaintiffs' approach was an effort to bring themselves within accepted circuit doctrine and precedents.

In addressing the University's challenge to the judgment against it, the Eighth Circuit stated:

> The University appeals, arguing that, as a matter of law, it took no "adverse employment action" that could be considered retaliation for allegations of sex discrimination. We agree.

(App. 3.)

Later, the circuit court went on to recite each of the alleged adverse employment actions and address them individually. (App. 4-6.) Dealing first with *the alleged exclusion from review committees and phase out planning*, the court noted that:

> The plaintiffs have directed us to nothing that establishes their right to be so included. They point to no law, custom or practice that gives them such a right. We note, moreover, that each plaintiff testified before at least one of the review committees. Finally, we saw no evidence other than timing tending to establish that the challenged exclusions of the plaintiffs were because of their allegations of sex discrimination. Timing alone is not enough *in the circumstances of this case*. [Emphasis added.]

The Court of Appeals went on to affirm the trial court's holding that the closing of the department as an administrative unit could not be considered an adverse employment action and that the change in title and other procedures was simply an inevitable consequence of the decision to close the department. (App. 6.)

REASONS FOR DENYING THE WRIT

I. The "Question Presented" By Petitioners Is Not Presented.

Petitioners state that the question presented is whether the court of appeals applied the proper standards for assessing a prima facie case of retaliation under Title VII. For several reasons, the University suggests that is not the issue here.

First, there was no dispute below about the elements of a retaliation claim. The court below set out a widely accepted statement of what a plaintiff must prove in order to prevail (App. 4), and Petitioners did not take exception to that statement below or here. Both below and here Petitioners' real claim is merely that a properly stated rule of law has been misapplied. As Supreme Court Rule 10 expressly states, such a claim is rarely a basis for granting a petition.

Second, as a procedural matter, the trial court held, both in denying the University's motion for summary judgment and its motion for judgment as a matter of law at the close of plaintiffs' case, that plaintiffs had satisfied their burden of making a prima facie case. Both the courts below and this court now can consider the retaliation claim in light of all the record evidence. *United States Postal Service v. Aikens*, 460 U.S. 711, 715-16, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

Finally, it may be helpful to note that the retaliation claim in this case did not involve the typical fight over intent or motivation. Rather, the University argued that it had engaged in no predicate act (or inaction) sufficient

for a Title VII claim. It is the intent or motivation element in discrimination cases, i.e., the difficulties of both proof and disproof, that prompted this Court to adopt the *McDonnell-Douglas* burden-shifting framework. There are no comparable difficulties in identifying, describing, and proving the employer's conduct which require the use of presumptions. Nothing in the decision below is inconsistent with the Court's prior pronouncements.

II. This Case Presents No Important Federal Question Concerning The Application Of The Causation Element Of A Retaliation Claim.

Petitioners object to the statement in the opinion below that "timing alone is not enough in the circumstances of this case." (App. 5.) In context and on its face, this statement cannot be understood as announcing a new rule of law, much less one that conflicts with the holdings of other circuits.[3]

As set out above, the context of the criticized language relates solely to Petitioners' claim that the University's review and phase out planning processes afforded insufficient participation opportunities to the dental hygiene faculty.

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[3] If there is a conflict in the circuits concerning whether to apply a "but for" or a "substantial factor" test in addressing the causation element of a retaliation claim, it is not relevant here because the courts below were never asked to address the issue and because it would make no difference to the outcome here which test were applied.

The University has consistently contended that such claims cannot be adverse *employment* actions because they involve broad issues of academic and administrative judgment that have no obvious connection to any particular person's employment. Petitioners' view is that any decision, even if unrelated to anyone's job, can be characterized as retaliatory if it is taken reasonably proximate in time to protected activity. The court below was merely saying that, in a circumstance where the decision is not job-related, timing alone is not enough to transform that decision into an adverse *employment* action.

III. The Court Below Did Not Limit Retaliation Claims To Employment Actions Which Infringe Upon Employees' Rights.

Petitioner makes a sweeping interpretation of language in the opinion below which is in fact quite narrow and appropriate in the context in which it is used.

Referring again to Petitioners' complaint of insufficient participation in the review and phase out planning processes, the court noted that they pointed to no law, custom or practice that gave them a right to more extensive participation in these processes.

Most retaliation claims involve allegations of specific, tangible and affirmative actions directly detrimental to an employee, such as termination. A few claims have involved allegations of failure to act or withholding of benefits afforded others. The claims here relating to participation in review and planning processes are of this latter type. As is generally the case in tort law, one can impose liability for failure to act only by showing a duty

to act. Similarly, said the court below, if one claims retaliation based on not receiving a requested benefit, it is necessary to show that one is entitled to receive the benefit or, at the least, that other persons similarly situated have received the requested benefit or treatment. Petitioners could not make such a showing here; as a matter of law this allegation could not constitute an adverse employment action. Rather than generating a major change in the law, the court below was carefully and narrowly applying established doctrine to specific facts.

IV. The Holding That Petitioners Have Failed To Prove An Adverse Employment Action Is Not In Conflict With Decisions In Other Circuits.

Petitioners suggest that unless certiorari is granted here, some retaliation plaintiffs will be dismissed as a matter of law while others prevail on nearly identical fact patterns. It is easy to make that assertion. It would not be particularly difficult to document it by reference to specific cases if it were true.

Here, it is not true. Petitioners point to no decisions, and Respondents know of none, in which on remotely analogous facts a court has held that a plaintiff has established an adverse employment action.

Rather, Petitioners' discussion focuses only on the language employed by the court to articulate its reasoning and then in a manner that is abstract, academic and frequently out of context. Respondent respectfully suggests this Court should decline the invitation to sit as an editorial board for the *Federal Reporter*.

Thus, Judge Posner's referenced musing that there is "some tension" in the cases relating to how severe and how job-related an "adverse employment action" must be to sustain a retaliation claim may well be insightful. However, he determined in *McDonnell v. Cisneros*, 84 F.3d 256, 259 (7th Cir. 1996) that he need not sort out the tangle in the case before him because those potential issues were not involved. So here Respondent respectfully suggests that this Court may wish to await a case in which that "tension" is actually present or where the decision below actually conflicts with the decision of another circuit to determine whether relief from the tension is required.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PAULINE BRINE, ELIZABETH PELTON and NANCY THOMPSON,	)	
Plaintiff,	)	No. 4-94-CV-20688
vs.	)	ORDER
THE IOWA BOARD OF REGENTS AND THE UNIVERSITY OF IOWA,	)	(Filed Jun. 15, 1995)
Defendants.	)	

Trial in this matter was held April 10-25, 1995. Both parties have filed post-trial motions. Defendants have moved for Judgment as a Matter of Law, and have also moved for a New Trial on the claim of retaliation. Plaintiffs seek Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial. They also request equitable and compensatory relief pursuant to their claims.

Oral argument on these matters was held June 1, 1995. On June 15, 1995 Plaintiffs filed a Supplemental Memorandum in Support of Plaintiffs' Motion for Equitable and Compensatory Relief. These motions are now fully submitted and ready for ruling.

I. BACKGROUND

Plaintiffs are three of the four female tenured faculty members of the University of Iowa College of Dentistry's

Dental Hygiene Department. The University's Department of Dental Hygiene began in 1953. All faculty and students of the department, including all former faculty and graduates, have been women. On November 11, 1991, after an internal review, the University of Iowa (University) recommended to the Iowa Board of Regents (Regents) that the Department of Dental Hygiene be closed. After numerous meetings, reviews, and hearings, in April 1992 the Regents voted six to three to close the Department of Dental Hygiene effective June 30, 1992.

Plaintiffs filed their civil rights charges in May 1992, contending that the decision to close the Department of Dental Hygiene caused a disparate impact on women in general, and disparate treatment to the Plaintiffs. After filing these charges, Plaintiffs received identical modest salary increases which they claim were lower than the "average" for the faculty at the College of Dentistry (College). Their salary increases prior to filing their complaint were also below "average," but the amount varied among Plaintiffs. Plaintiffs contend this pattern of salary increases demonstrated retaliation for filing the discrimination charge, and for their complaints during the Fall of 1991 about what they perceived to be sex discrimination by the University and Regents. Their federal complaint asserted causes of action based on discrimination, retaliation, as well as violations of their rights to free speech, equal protection, and due process. The court bifurcated claims which were equitable in nature and not appropriate for submission to the jury. The jury gave an advisory finding on the issue of damages which were incurred prior to the effective date of the Civil Rights Act of 1991 Amendments, November 21, 1991.

The jury returned a verdict on April 27, 1995, against Plaintiffs on their claims for disparate treatment, but in their favor on the claims of retaliation. The jury awarded Plaintiffs compensatory damages for the retaliation violation.[1] The jury also found Defendants had violated Plaintiffs' First Amendment rights and awarded each plaintiff $1.00 in damages.

On May 5, 1995, this court rendered its Opinion and Judgment regarding Plaintiffs' equitable claims. Specifically, the court found Plaintiffs failed to establish any of their discrimination claims under either state or federal law. The court further found that Defendants' acts following the filing of the civil rights charges were retaliatory.

II. DEFENDANTS' POST-TRIAL MOTIONS

A. Motion for Judgment as Matter of Law

In reviewing a motion for judgment as a matter of law, it must be considered whether there is sufficient evidence to support the jury's verdict. *Smith v. World Ins. Co.*, 38 F.3d 1456, 1460 (8th Cir. 1994). The Court makes a determination by analyzing "the evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility. . . . [A]ll the evidence must point one way and be susceptible of no reasonable

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[1] Brine received $7,655 in lost wages and $65,000 in emotional distress damages; Pelton received $7,770 in lost wages and $65,000 in emotional distress damages; and Thompson received $4,211 in lost wages and $65,000 in emotional distress damages.

inference sustaining the position of the nonmoving party." *Id.* (quoting *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992)).

1. First Amendment

Defendants claim they are entitled to judgment as a matter of law on the issue of whether they violated Plaintiffs' free speech rights. Defendants contend Plaintiffs cannot recover on this theory first, because Defendants are not proper section 1983 defendants; second, the claim is barred by the Eleventh Amendment of the United States Constitution; and third, Plaintiffs have not precisely defined or set forth what speech they allege was protected.

As to Defendants' first argument, the respective language of the Civil Rights Act states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. It is well-established that a state or state agencies are not "persons" for purposes of the statute. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). As agencies of the state of Iowa, the University of Iowa and the Board of Regents as an entity cannot be sued in

federal court. *See Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

Plaintiffs assert case law supports the proposition that all educational institutions are to be considered "persons" under the requirements of section 1983. However, this assertion is too broad, as demonstrated by the discussion of the Eleventh Amendment bar in *Van Pilsum v. Iowa State Univ. of Science and Technology*, 863 F. Supp. 935 (S.D. Ia. 1994). In *Van Pilsum*, Judge Vietor closely examined the nine factors which a court is directed to consider when evaluating an entity's status under the Eleventh Amendment.[2] It was the court's conclusion that the economic and administrative structure of the university system in Iowa as well as the rights and duties of the institutions demonstrated that the Regents and universities were not separate entities but instead, were part of the sovereign of the state of Iowa. *Van Pilsum*, 863 F. Supp. at 939.

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[2] Those factors are "(1) local law and decisions defining the status and nature of the agency involved in its relation to the sovereign; (2) most importantly, whether the payment of the judgment will have to be made out of the state treasury; (3) whether the agency has the funds or the power to satisfy the judgment; (4) whether the agency is performing a governmental or proprietary function; (5) whether it has been separately incorporated; (6) the degree of autonomy over its operations; (7) whether it has the power to sue and be sued and to enter into contracts; (8) whether its property is immune from state taxation; and (9) whether the sovereign has immunized itself from responsibility for the agency's operations." *Van Pilsum*, 863 F. Supp. at 937, quoting *Sherman v. Curators of Univ. of Mo.*, 16 F.3d 860, 865 n.6 (8th Cir. 1994).

Cities, school districts, and other local government institutions, including some state educational institutions, may be properly named as section 1983 defendants. However, when the university is intertwined with the state to the extent that the institution cannot be distinguished from the state, neither the university nor its board of regents may be named as section 1983 defendants. *Cf. AASE v. South Dakota Bd. of Regents*, 400 N.W.2d 269 (S.D. 1987) (board not person within meaning of § 1983).

Based on the reasoning in *Van Pilsum*, the court holds that Plaintiffs' first amendment claims are barred by the immunity conferred by the Eleventh Amendment of the United States Constitution. Because of this, it is not necessary to address whether Plaintiffs have sufficiently proven their substantive cause of action.

Defendants' Motion for Judgment as a Matter of Law on this issue is granted.

2. Retaliation

Although Plaintiffs failed to prove their claims that the closing of the department was discriminatory, they did prevail on their retaliation claims. Defendants allege Plaintiffs' evidence was legally insufficient to establish either an "adverse employment action" or any causal connection between the employment action and the protected activity. Defendants further assert there is no evidence to support Plaintiffs' position that any damages arose prior to November 1991, nor is there any evidence to support the award of lost salary or emotional distress.

a. Protected Activity and Adverse Employment Action

The jury was instructed that in order to find retaliation, Plaintiffs had to show: 1) they were engaged in a protected activity; 2) they suffered an adverse employment action; and 3) there was a causal connection between the protected activity and the adverse employment action. *See* Jury Instruction No. 5; *see also Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548 (8th Cir. 1993). The parties agree this instruction accurately sets out the elements of a retaliation claim.

Plaintiffs strongly voiced their opposition to the department's closing as early as September 1991, immediately after learning that the program was being considered for termination. The evidence showed that Plaintiffs' opposition was based on educational as well as sex discrimination concerns. Opposition to discrimination is recognized as protected activity. 42 U.S.C. § 2000e-3(a) ("It shall be an unlawful employment practice . . . to discriminate . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, . . . ").

An adverse employment action is not limited to discharge or demotion. For example, the Eighth Circuit Court of Appeals has found adverse employment actions where plaintiffs were transferred and subjected to poor working conditions. *Bradford v. Norfolk S. Corp.*, No. 94-2625 (8th Cir. May 18, 1995). Plaintiffs assert the University made a number of adverse decisions, including structuring the closing to result in the early demotion of Professor Brine from Department Executive Officer

(DEO), failing to include the department faculty in the planning for phase out activities, and Plaintiffs' receipt of identical salary increases which were lower than the "average" salary increase awarded in the College of Dentistry.

i. Demotion of Professor Brine

The Regent's decision to close the department was effective June 30, 1992, with allowance for existing students to complete their degrees. Although closing a program is not an adverse employment action, *Harlston v. McDonnell Douglas*, 3 F.3d 379, 382 (8th Cir. 1994), this action eliminated the necessity of Professor Brine to remain as the DEO. Plaintiffs argue that because there were three years left before the final class of students graduated, it was retaliatory and punitive to reduce her position to either Director or Program Coordinator. Even though Professor Brine no longer held DEO status, she continued to function as the head of the program. However, the Department's closure resulted in her reporting to the DEO of the Department of Preventative and Community Dentistry, Dr. Jed Hand, rather than reporting directly to the Dean of the College of Dentistry, James McLeran. Professor Brine was without authority to make decisions routinely made as department head (including ordering office supplies without Hand's approval), attend DEO meetings, or any direct input in the programs in the College of Dentistry. Finally, Plaintiffs argue the unnecessarily early dismantling of the Dental Hygiene Department resulted in the loss of resources, professional self-

esteem, research grants for themselves, as well as career opportunities for the department's students.

It was not an adverse employment decision to eliminate the duties of the DEO in light of the decision to eliminate the department. *Harlston,* 37 F.3d at 382 (reassignment without diminution of salary or benefits not adverse employment action). However, the timing of such a decision may be an adverse employment decision. Plaintiffs presented evidence that other programs that were also being eliminated at the University were allowed to maintain their department status and DEO positions until the last class of students had graduated. Further, although Professor Brine was assigned her regular responsibilities inherent in leading a department, she was not given the commensurate authority to carry out those responsibilities. From this evidence, a jury could have reasonably concluded that the decision to immediately dismantle the department structure, including Professor Brine's position as DEO, was retaliatory.

ii. Phase Out Activities

Plaintiffs' evidence demonstrated the exclusion from active participation in the Ad Hoc Committee and other review processes prevented them from, among other things, presenting data and information relevant to the closure issue, responding to concerns raised by committee members, correcting inaccurate committee minutes, and receiving information crucial to forming a response to the closure decision. A jury could have reasonably concluded that failure to directly include Plaintiffs in

these activities showed personal hostility related to their complaints of discrimination.

Plaintiffs' evidence also established that there was no follow-through from the University on the issue of assignment to new "academic homes," which will impact on their future advancement and job security. Although Plaintiffs have not taken the lead to resolve this issue, the manner and timing of the Defendants' limited efforts could have allowed a jury to reasonably conclude that these actions were retaliatory.

iii. Identical Salary Increases

After filing their charges of discrimination with the appropriate agencies, Plaintiffs received identical pay raises. Pay raises prior to this time varied among the three plaintiffs. Further, Plaintiffs presented evidence that their raises were lower than the "average" salary increase given within the College of Dentistry. Based on Plaintiffs' Exhibit 1693, the jury awarded Plaintiffs the difference between their actual salary increases and the "School Average Annual Percent Increase."

A failure to receive commensurate salary increases as those of similarly situated male faculty may constitute an adverse employment action. *See Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 479 (8th Cir. 1984) (female faculty members received lower salaries overall and received fewer market-factor and performance increases). However, there must be credible evidence of such disparity. In computing the "School Average Annual Percent Increase," the College of Dentistry includes increases

allocated from the General Education Fund (G.E.F.), earnings from the Dental Services Plan (D.S.P.), grants and contracts, and promotion increases. There was no evidence that Plaintiffs were eligible for any money from grants, contracts, or any significant amount of services performed under the D.S.P. Instead, they qualified only for raises under the G.E.F. or a promotion, if applicable. Nor did Plaintiffs present evidence that their work merited more than the standard G.E.F. increase which other salaried Dental College employees received. Plaintiffs compared their G.E.F. raises to others who received raises from the G.E.F. as well as other sources. When compared only to the G.E.F. raises received by others, Plaintiffs were at or above the level of other faculty members. Plaintiffs argue that had their Department been better staffed or supported by the administration over the previous decade, they would have been in a position to perform more D.S.P. or grant work, and thus, have been eligible for payments from these sources. However, there was no showing that this purported "lack of support" was at all related to lower raises due to *retaliation* for complaints about sex discrimination.

In their cross-examination, Defendants criticized Plaintiffs' comparison of their salary increases with increases received by all others in the College of Dentistry. However, the jury disregarded Defendants' explanation. Plaintiffs' evidence is not susceptible of any reasonable inference sustaining their position as they were not entitled to raises from any other source other than the G.E.F. To compare Plaintiffs' circumstance to others not similarly situated skews the correlation of salary increases. The jury could not have reasonably

relied on Plaintiffs' evidence to conclude that Plaintiffs' salary increases were lower than "average," as there was no credible evidence presented which accurately proved the "average" to which they compared themselves, or that there was an automatic entitlement to an "average" increase.

Plaintiffs' argument is twofold, however; that is, even if the salary increases were not lower than others similarly situated, Plaintiffs received a lack of individualized treatment which they claim was retaliatory-based. Standing alone, receiving identical increases is insufficient evidence to establish retaliation.

3. Damages Prior to November 1991

Defendants claim Plaintiffs may not recover damages prior to the effective date of the 1991 amendments to the Civil Rights Act, November 21, 1991. First, Defendants claim there was no evidence of either actual or compensatory damages prior to that date. Second, Defendants assert that the amendments were not retroactive, and thus, cannot be applied prior to that time.

The court first addresses the argument of lost wages. The jury's verdict included lost wages to Pauline Brine of $7,655; Elizabeth Pelton of $7,700; and Nancy Thompson of $4,211. As discussed above, the jury arrived at these figures using Plaintiffs' exhibits which compare the Plaintiffs' salary increases with the increases of others whose increase is attributable in part to sources unavailable to Plaintiffs. For the reasons stated above, this evidence is not susceptible of a reasonable inference sustaining Plaintiffs' position, and the award of lost wages is stricken.

Compensatory damages, however, are available to Plaintiffs. Plaintiffs showed evidence that they voiced their complaints of sex discrimination and opposition to the closing, and were not kept informed or allowed direct participation regarding certain decisions leading to the closing. It was reasonable for the jury to conclude that some measure of emotional distress damages arose prior to November 1991. Plaintiffs would not be able to recover compensatory damages prior to November 21, 1991, under Title VII. *Landgraf v. U.S.I. Film Prod.*, 114 S. Ct. 1483, 1508 (1994) (compensatory damages not retroactively applied to *conduct* occurring prior to effective date of Amendments). However, there is no retroactivity barrier under state law. Iowa Code Chapter 216 (1991). Plaintiffs are entitled to their full award of compensatory damages under Iowa law.

4. Actual Injury

Defendants also claim the compensatory award should be stricken because Plaintiffs did not suffer actual damages. Plaintiffs are still tenured faculty at the University of Iowa in the College of Dentistry, have not had their pay reduced, and continue to receive pay raises. Without these or any lost wages, Defendants argue Plaintiffs may not recover compensatory damages.

Under Iowa law, "a civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct." *Hy-Vee Food Stores, Inc. v. Iowa Civ. Rights Commn.*, 453 N.W.2d 512, 526 (Iowa 1990). Because Plaintiffs are entitled to compensatory damages under

Iowa law, it is not necessary to address whether they have suffered actual injury sufficient to recover compensable damages under 42 U.S.C. § 1981a. *See Farrar v. Hobby*, 113 S. Ct. 566 (1992) ("no compensatory damages may be awarded in a § 1983 suit absent proof of actual injury").

Emotional distress does not have to be severe to be compensable. *Id.* Professor Brine lost her status as Department Executive Officer, because of the structure of the phaseout the Plaintiffs' teaching responsibilities increased over the course of the closing, and they contend their marketability to other dental hygiene programs and research opportunities have been reduced. Further, the failure to assign Plaintiffs to permanent academic homes has diminished their job security and left future teaching assignments uncertain. Although Plaintiffs have not established that they suffered monetary damages, they are not without injury. The record supports an award of compensatory damages which reflects each Plaintiffs approximate one year salary. Although the award of approximately one year's salary per Plaintiff may seem high for the type of distress alleged, the court will not substitute its opinion for that of the jury.

Because Plaintiffs are entitled to compensatory damages under Iowa law, the court does not consider whether they are entitled to such damages under Title VII or Title IX. Further, because the Iowa Civil Rights Act was not affected by the amendments to the Civil Rights Act of 1991, the court need not distinguish between which part of the award was pre- and post-November 1991 damages. Under Iowa law, Plaintiffs are entitled to their full compensatory damage award.

B. Motion for New Trial

Defendants alternatively move for new trial because the verdict was against the weight of the evidence. " 'In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence – it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.' " *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992) (quoting *Ryan v. McDonough Power Equip.*, 734 F.2d 385, 387 (8th Cir. 1984)). Although it has great discretion, the district court is not free to set aside a jury verdict merely because it disagrees with the jury's verdict. *Id.* The "ultimate test was whether there had been a miscarriage of justice." *Id.* Thus, before a verdict can be set aside, "the district court must state its reasons for concluding that the verdict is against the great weight of the evidence." *Id.* at 781.

In support of its motion for new trial, Defendants reiterate most of the arguments made under their Motion for Judgment as a Matter of Law. Having granted Defendants' motion regarding the First Amendment issues, it is not necessary to consider the Motion for New Trial on those claims. Further, when considering Defendants' arguments on the other issues raised in the Motion for New Trial, the court finds the verdict is not against the great weight of evidence. Defendants' Motion for New Trial on those issues is denied.

One issue raised in Defendants' Motion for New Trial which was not included in its Motion for Judgment as a Matter of Law is the assertion that the court erred when

admitting into evidence a synopsis of the trial and decision of *Jew v. Univ. of Iowa*, 749 F. Supp. 946 (S.D. Ia. 1990). Ironically, Plaintiffs also assert there was prejudicial error from the court's failure to admit into evidence the judgment entered in *Jew*. The court considers these arguments jointly.

Dr. Jean Jew, M.D., was a member of the University of Iowa faculty in the College of Medicine. In 1986, Dr. Jew filed a gender discrimination suit against the University of Iowa and Board of Regents asserting both a Title VII claim for hostile work environment and a claim pursuant to Iowa's parallel antidiscrimination statute. *Jew*, 749 F. Supp. at 947, 956. Plaintiffs sought to introduce the entire *Jew* decision, including post-judgment motions and orders, into evidence by asserting it was crucial to the jury's consideration on the issue of intentional discrimination. Defendants argued the information should not be given to the jury in any form.

"Evidence of other employer actions is admissible when it supports an inference of discrimination." *Bradford v. Norfolk S. Corp.*, No. 94-2625 (8th Cir. May 18, 1995) (citing *Phillip v. ANR Freight Sys. Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991)). "The evidence, however, must assist in the development of a reasonable inference of discrimination within the context of each case's respective facts." *Id.*

Plaintiffs assert *Jew* was relevant to show a violation of the same law at the same campus with the same administration. However, the facts of *Jew* do not assist in the development of a reasonable inference of discrimination in this case. *Jew* was a nonjury case regarding disparate treatment only. Further, the discrimination occurred

within the College of Medicine as opposed to actions University-wide. The *Jew* decision was rendered two years before the closure decision and was totally unrelated to the incidents in this College or case. It does not relate to the history or work practices of Plaintiffs' employers, nor does it demonstrate Defendants' pattern or practice of discrimination against females at the University of Iowa. Because the decision in *Jew* does not support an inference of discrimination in this case, any reference to that case, even a limited reference, should have been excluded from the evidence.

Defendants' argument does not prevail either. The court submitted to the jury a one-page summary of the *Jew* case with a limiting instruction.[3] Apart from a brief reference to the *Jew* decision with a few witnesses, Plaintiffs never mentioned the decision the rest of the trial, including closing arguments.[4] by the jury's verdict, this

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[3] The jury was cautioned: "This information is admitted for the limited purpose of aiding the jury's assessment of whether the defendants' asserted reasons for actions taken are a pretext for intentional sex discrimination."

[4] Plaintiffs assert they were prevented from making reference to the *Jew* decision in their closing argument, including reference to the requirement that the Deans of the University read the decision within 45 days of Judge Vietor's decision. The synopsis of the *Jew* decision used states in part: " . . . the Court ordered distribution of the investigative report and the Court's opinion to and review of it within 45 days by the Board of Regents, the University of Iowa's President and Vice President, the *Deans of all Colleges* and the Department Heads of the College of Medicine and faculty/staff in the Department of Anatomy." From Synopsis read by the Court (emphasis added). Plaintiffs had sufficient opportunity to read and argue this information to the jury.

account of the *Jew* decision was not prejudicial to Defendants, and does not warrant a new trial.

III. PLAINTIFFS' MOTIONS

Plaintiffs have also filed post-trials motions, including a Motion for Judgment Notwithstanding the Verdict (JNOV)[5] or In the Alternative, New Trial, and Motion for Equitable Relief.

A. Motion for JNOV or New Trial

To determine whether judgment as a matter of law is appropriate, the court must consider whether there was sufficient evidence to support the jury's verdict. *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992). In making this determination, the "court must analyze the evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility. . . . [A]ll the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the nonmoving party." *Id.*

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[5] Under Fed. R. Civ. P. 50(a), motions for judgment as a matter of law now encompass all motions labeled as motions for judgment notwithstanding the verdict or motions for a directed verdict. See Commentary to Rule 50(a). The standard of review for a motion notwithstanding the verdict is interchangeable with the standard for a motion for judgment as a matter of law. *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1400 n.1 (8th Cir. 1994).

1. Disparate Treatment and Disparate Impact

Plaintiffs assert they were discriminated against based on sex, under theories of both disparate treatment and disparate impact. Their argument is an attempt to relitigate the issues already decided by the jury and by this court. Plaintiffs have failed to demonstrate that the evidence is susceptible of no reasonable inference sustaining these determinations.

2. Factual Inaccuracies in Order

Plaintiffs assert the court's Opinion and Judgment contains a number of inaccuracies and misstatements of fact. For example, Plaintiffs allege that the court inaccurately described the criteria applied by the Strategic Planning Steering Group and the timing of a public announcement; the court misunderstood the relationship of the Dental Hygiene Program with the general educational requirements; the court misrepresented the significance of the timing of the review process and the actual decision to close the department; and the court distorted Plaintiffs' presentation of information to the Ad Hoc Committee. Based on their perceived misunderstandings, Plaintiffs regard the entire Opinion and Judgment as tainted.

Most of the "inaccuracies" asserted by the Plaintiffs could be characterized as a difference in interpretation as opposed to a genuine misstatement of the record. As one example, Plaintiffs state the following:

> The Court continues stating that the ERC [External Review Committee] received information

> with regard to the Department from the Dental Hygiene Faculty and members of the public. *Although this is technically correct,* the amount of outside information that was considered by the ERC was extremely limited, and the majority of the information reviewed by the ERC was from the AHC [Ad Hoc Committee] hearings and reports. The correctness of the recordation of this information and its accuracy were questioned on several occasions.

Memorandum in Support of Plaintiffs' Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial at page 26 (emphasis added). These asserted errors appear to be reargument of the case rather than a request to the court to correct factual mistakes. Even if the record was inaccurately reflected in the Opinion and Judgment, Plaintiffs have failed to demonstrate that any of these errors would affect the ultimate decision of the court or jury.

3. Failure to Instruct on Disparate Impact

The 1991 Amendments to the Civil Rights Act exclude trial by jury where the discrimination claim is based on a disparate impact theory. 42 U.S.C. § 1981a(a)(1). However, Plaintiffs argue the jury should have been separately instructed on the issue under Iowa Code Chapter 216. Additionally, Plaintiffs reiterate their exception to the court not giving a separate instruction for their claim under Title IX of the Educational Amendments of 1972.

The Iowa Supreme Court has held that no right to a jury trial exists under the Iowa Civil Rights Act. *Smith v.*

ADM Feed Corp., 456 N.W.2d 378, 380 (Iowa 1990) (legislature did not intend for civil rights claimants to have statutory right to jury trial in district court under Chapter 601A [now Chapter 216]). Therefore, Plaintiffs' assertion that they were entitled to an instruction on disparate impact under Iowa law is not valid.

Case law does not directly address Plaintiffs' Title IX argument, however. The provisions of Title IX prohibit sex based discrimination in any educational program or activity receiving federal funding. 20 U.S.C. § 1681(a). This statute provides for a private right of action which is separate and distinct from a Title VII action or any other antidiscrimination claim. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979). However, circuits appear to be divided as to whether Title IX claims are governed by the same principles applicable to Title VII actions. *See Preston v. Commonwealth of Virginia ex rel. New River Community College*, 31 F.3d 203, 206 (4th Cir. 1994) (First, Eight, and Tenth Circuits holding Title VII provisions instructive for Title IX claims; Eleventh Circuit refusing to apply Title VII concepts to Title IX claim). Although not directly addressing the issue before this court, the Eighth Circuit has held that to the extent a plaintiff challenges conditions of employment as being discriminatory, the "Title IX claim merely duplicates her Title VII claim." *O'Connor v. Peru State College*, 781 F.2d 632, 642 n.8 (8th Cir. 1986). It is reasonable to find "that Title VII, and the judicial interpretations of it, provide a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX." *Preston*, 31 F.3d at 207.

In holding that the Title IX claim here duplicated the Title VII claim, there was no reason to separately instruct

the jury on the Title IX claim. To do so would have only served to confuse the jury and create opportunity for an inconsistent verdict. Plaintiffs' motion for new trial on this issue is denied.

4. Failure to Instruct on Equal Protection and Due Process

For the reasons stated above, these named Defendants are not proper subjects for a suit arising under section 1983. Defendants were entitled to a directed verdict on this issue, and it was proper not to instruct the jury on the basis on equal protection and due process.

B. Request for Equitable and Compensatory Relief

Based on their awards, Plaintiffs seek equitable and compensatory relief.

1. Prejudgment Interest

Plaintiffs are requesting prejudgment interest from July 1, 1992, through May 5, 1995. Title VII provides for the payment of prejudgment interest from the date of the discriminatory action to the date of the judgment. *EEOC v. Rath Packing co.*, 787 F.2d 318, 333 (8th Cir. 1986). This recovery is limited, however, to claims against private employers. *Cross v. U.S. Postal Serv.*, 733 F.2d 1327, 1328 (8th Cir. 1984); see also *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815 (7th Cir. 1990) (noting prejudgment interest included as back pay remedy in suits against private employers). Defendants are not a private employer. As part of the

sovereign, Defendants are not required to pay prejudgment interest unless they give their consent.

Plaintiffs' request for prejudgment interest is denied.

2. Back Wages

Plaintiffs also seek back wages which would align their current salaries with what they believed to be appropriate wages. Plaintiffs assert they are entitled to receive the "average" school raise for the academic years 1992 through 1995. Although the jury used these figures to assign a figure of lost profits, the evidence does not support an award of back wages. Plaintiffs have failed to prove they are entitled to back wages, or any factual basis for such calculation. This motion is denied.

3. Increase Current Salary Level

Plaintiffs further assert that their current salary level should be increased to correspond to the raises they claim they should have received. Plaintiffs' current salaries have been based in part on the salary increases received in the past three years. There was no evidence presented that Plaintiffs' increases should be anything other than what was given them under the G.E.F. Likewise, there is no evidence that Plaintiffs' current salary level should be adjusted. This request is also denied.

4. Emotional Damages

The jury awarded each Plaintiff $65,000 for emotional damages. As stated in the Opinion and Judgment and in this order, *supra,* there was sufficient evidence for the jury

to grant this award. Plaintiffs shall each receive $65,000 in compensatory damages. *See EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 358 (8th Cir. 1994) (plaintiff only entitled to one compensatory damage award regardless of number of successful claims).

5. Nominal Damages

For the reasons discussed above, the section 1983 claims brought by the Plaintiffs are not cognizable against Defendants. The nominal damages awarded by the jury and court are stricken.

6. Postjudgment Interest

"Interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961. The Clerk of Court is responsible for determining the applicable Treasury Bill rate measured from the date of entry of judgment. By law, Plaintiffs are entitled to post-judgment interest.

7. Continuation of the Program

In their request for equitable relief, Plaintiffs seek the continuance of the Dental Hygiene Program as a separate and distinct department within the College of Dentistry, with Professor Brine as DEO; that all three Plaintiffs be promoted to the position of full professor with tenure; that the fifth faculty position be funded; to fund recruitment efforts; and provide financial aid in the form of

assistantships or tuition reductions for incoming students. Although the jury and this court found Defendants, through their agents, retaliated against Plaintiffs, there was no evidence that Defendants do not retain the capabilities to make rational and nondiscriminatory decisions in the future. The relief requested by Plaintiffs would require this court to usurp the responsibilities already delegated to the Regents and other administrative personnel in the College of Dentistry and College of Liberal Arts, or University. An order such as Plaintiffs' request is inappropriate in this situation. *C.f. Miller v. Lovell,* 14 F.3d 20, 21 (8th Cir. 1994) ("The Fourteenth Amendment's Due Process Clause does not convert the federal courts into arbitral forums for review of commonplace personnel decisions that public agencies routinely make.").

This court declines to order Plaintiffs' requested injunctive relief.[6]

In their supplemental memorandum, Plaintiffs request further relief from the court based on the "bad acts" of Defendants' counsel. Plaintiffs assert Defendants' counsel wrongfully disclosed Professor Pelton's medical information to individuals who were not privileged to examine this information. The circumstances relating to the disclosure were discussed; the court found that it had not been improperly disseminated, and that in any event, the material was now part of the unsealed trial record.

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[6] In the alternative, Plaintiffs requested that this matter be certified for interlocutory appeal. At oral argument, Plaintiffs withdrew their request.

Defendants' counsel assured the court they would provide written verification that all persons who received the information pre-trial had in fact returned any copies of the information, and that the information would not be further divulged. Plaintiffs state they have not received this written verification.

If Defendants' counsel have not yet provided the written assurances which they made on the record, they shall do so within ten days of the date of this order. Failure to do so may result in sanctions against Defendants' counsel.

Plaintiffs also request that a judgment similar to that imposed by Judge Vietor in *Jew*, requiring dissemination and publishing the opinion, be imposed on Defendants. The court does not find, however, that it is necessary to issue a *Jew*-like judgment in this case. *Jew* involved specific incidents of discrimination by her colleagues and supervisors which may have been prevented had the administrators responded more promptly to their requirements under the law. The conditions in *Jew* are not present here, and this type of judgment is inappropriate under these circumstances.

9. Attorney Fees

Under Title VII, Title IX, and Iowa Code Chapter 216, a court has the discretion to award attorney fees to the prevailing party as part of the costs assessed. 42 U.S.C. § 2000e-5(k); 42 U.S.C. § 1988(b); and Iowa Code § 216.16.(5). To be eligible for a fee award, a plaintiff must prevail on "any significant claim affording some of the relief sought." *Texas Ass'n. v. Garland*, 489 U.S. 782, 791

(1989) (rejecting requirement that plaintiff must prevail on "central issue" and achieve "primary relief sought"). The jury awarded Plaintiffs significant relief on their retaliation claim. This recovery entitles Plaintiffs to prevailing party status. Additionally, based on their recovery, the court is not inclined to reduce Plaintiffs' fees significantly, if at all, for lack of success. The court continues to look closely, however, at the documentation used to establish the lodestar in this case, and the nature and extent of expenses charged.

Plaintiffs have submitted their request for fees and costs, totalling $396,753.16[7], and Defendants have filed their objections. Rather than parsing through the fee bills, the court encourages the parties to reach a settlement in respect to attorneys' fees and costs. Plaintiffs shall notify the court no later than noon of July 3, 1995, if the parties cannot agree to an award of fees and costs. If no settlement is reached by that date, the court will promptly make the award and enter final judgment.

V. CONCLUSION

Based on the foregoing,

(1) Defendants' Motion for Judgment as a Matter of Law (Pleading #141) is granted as to Plaintiffs' First Amendment claims; granted as to the award of lost wages; denied as to the remaining grounds;

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[7] This figure reflects fees and costs requested in Plaintiffs' original fee request and their supplemental memorandum filed June 15, 1995.

(2) Defendants' Motion for New Trial (Pleading #141) is denied;

(3) Plaintiffs' Motion for JNOV or In The Alternative Motion for New Trial (Pleading #136) is denied;

(4) Plaintiffs' Motion for Equitable and Compensatory Relief (Pleading #138) is granted as to compensatory damages, and post-trial interest; requests for prejudgment interest, back wages, an increase of current salary level, nominal damages, and injunctive relief are denied; Defendants have ten days from the date of this order to file written assurance with the court that Plaintiff Pelton's medical records have been adequately secured as directed by this order;

(5) Plaintiffs' Request for Attorney Fees and Costs (Pleading #138) remains pending until Plaintiffs inform the court as to the status of settlement of their request. Once the status report is received, judgment will be entered on all post-trial motions.

IT IS SO ORDERED

Dated this 15th day of June, 1995.

/s/ Celeste F. Bremer
CELESTE F. BREMER
CHIEF U.S. MAGISTRATE JUDGE